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United States
Court of Appeals

for the Ninth Circuit

WILLIAM D. NOLAND, Trustee, and WILLIAM
D. NOLAND, Personal,

Appellant,

vs.

HARRY C. WESTOVER, Collector, United States
Treasury Department, Internal Revenue Service,
Sixth Collection District of California, Los
Angeles Division, et al.,

Appellees.


Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

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PAUL P. O'BRIEN,



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No. 11978

United States
Court of Appeals

for the Ninth Circuit

WILLIAM D. NOLAND, Trustee, and WILLIAM
D. NOLAND, Personal,

Appellant,

vs.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Affidavits in Support of Motion for Summary Judgment:	
John H. Cramer	75
Norman Hayward	76
George D. Martin.....	73
Raymond B. Sullivan	74
Harry C. Westover.....	62
Affidavit of William D. Noland in Support of Second Amended Complaint, April 9, 1948..	35
Exhibit A—Benevolent Trust Estate, Contract and Agreement.....	36
Affidavit of William D. Noland in Support of Second Amended Complaint, April 19, 1948..	50
Exhibit E—Notice of Deficiency	51
Appeal:	
Certificate of Clerk to Transcript of Record on	126
Cost Bond on.....	92
Designation of Record on (Appellant's—DC)	95
Designation of Record on (Appellee's Amended—DC)	125
Notice of	91
Order Extending Time to Docket.....	121
Statement of Points on (Appellant's—DC)..	122
Statement of Points on (Appellant's—USCA)	196

	PAGE
Certificate of Clerk to Transcript of Record on Appeal	126
Complaint, Second Amended.....	13
Affidavits of William D. Noland in Support of	35, 50
Complaint in Cause No. 5716-W.....	98
Cost Bond on Appeal.....	92
Designation of Record on Appeal:	
Appellant's—DC	95
Appellees' Amended—DC	125
Docket Entries 3/19/48 through 5/4/48.....	89
Judgment, Summary:	
In favor of Defendant Westover.....	81
In favor of Defendants Martin, et al.....	83
Minute Order, March 30, 1948—Hearing on Motions, Objections, etc.....	86
Motion for Summary Judgment of Defendant Westover	58
Affidavit in Support of.....	62
Motion for Summary Judgment of Defendants Martin, et al.....	63
Exhibit A—Affidavit of George D. Martin...	73
Exhibit B—Affidavit of Raymond B. Sullivan	74
Exhibit C.—Affidavit of John H. Cramer...	75
Exhibit D—Affidavit of Norman Hayward..	76

	PAGE
Motion to Amend Complaint.....	85
Motion to Dismiss.....	2
Exhibit A—Affidavit of Harry C. Westover in Support of	8
Names and Addresses of Attorneys.....	1
Notice of Appeal	91
Notice of Motion for Summary Judgment.....	57
Objection to Motion to Dismiss.....	9
Exhibit A—Order and Judgment of Dismissal as to Defendants George D. Martin, Nor- man Hayward, Raymond B. Sullivan, and John H. Cramer.....	10
Objection to Motion for Summary Judgment:	
Defendants Martin, et al.....	78
Defendant Westover	80
Order and Judgment of Dismissal in Cause No. 5716-W:	
As to Defendant George D. Martin, et al....	117
As to Defendant Joseph D. Nunan, Jr.....	115
Order Extending Time to Docket Appeal.....	121
Affidavit in Support of.....	120
Statement of Points on Appeal:	
Appellants—DC	122
Appellants—USCA	196
Transcript of Proceedings, Reporter's:	
March 30, 1948.....	128
April 19, 1948.....	189

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

WILLIAM D. NOLAND, in Pro Per.
2030 Wilshire Blvd., Suite 201-205,
Los Angeles 5, Calif.

For Appellees:

JAMES M. CARTER, United States Attorney,
E. H. MITCHELL and
GEORG EM. BRYANT, Assistants U. S.
Attorney,

EUGENE HARPOLE, Special Attorney,
Bureau of Internal Revenue,
600 U. S. Post Office &
Court House Bldg.,
Los Angeles 12, Calif. [1*]

* Page numbering appearing at foot of page of original
certified Transcript of Record.

In the District Court of the United States,
Southern District of California,
Central Division.

No. 7315—O'C

WILLIAM D. NOLAND, H. K. MILLER, and
HARRY R. MAXWELL, Trustees, Dr. Wil-
liam D. Noland Trust Estate, Ltd., A Benevo-
lent Trust Estate, and WILLIAM D. NOLAND
Complainants.

vs.

HARRY C. WESTOVER, Collector, United States
Treasury Department, Internal Revenue Serv-
ice, Sixth Collection District of California, Los
Angeles Division.

Defendant.

MOTION TO DISMISS

Comes now the defendant, Harry C. Westover, Collector of Internal Revenue for the Sixth Collection District of California, by and through his attorneys herein mentioned and moves the Court to dismiss the above action with prejudice upon the following grounds, to-wit:

I.

Paragraph 4 in the prayer for relief on pages 13, 14 of the complaint herein prays "That the Internal Revenue Service be ordered to return with interest the amounts of \$35.64 and \$80.45 totaling \$116.10, to the trustees hereof for the aforesaid

benevolent trust estate, as claims for the return of said amounts were filed with the [2] Internal Revenue Service at Los Angeles, California, on or about March 15, 1946, and to date there has been no reply in reference to the said amounts of \$35.64 and \$80.45, which were paid as additional taxes in 1942 and claims filed on March 15, 1946, for the return of said amounts with the said Internal Revenue Service, and that Complainant Trustee be given judgment for said amounts with interest." Page 1 of Complainants' Exhibit I filed herein with the "Supplemental Memorandum of Points and Authorities in Support of Bill of Complaint" shows that by Complainants' own admission the above payment of \$80.45 was made on July 6, 1942. Page 3 of the above Exhibit I shows that by Complainants' own admission the above \$35.64 was paid on "dates of payment on or before March 15, 1943." It accordingly follows that none of the amounts as to which refunds are herein sought were paid later than the date of March 15, 1943, or prior thereto. None of such payments could in any event have been collected by the above defendant, Collector of Internal Revenue, since such Collector did not commence his duties as Collector of Internal Revenue for the Sixth Collection District of California until July 1, 1943. As to the date when such Collector assumed his duties see paragraph 21,018, page 21,027, Vol. 3 of the 1947 Prentice-Hall Federal Tax Service and affidavit of said Harry C. Westover, which is attached hereto, marked Exhibit A and hereby

incorporated herein by reference. None of the relief sought in Complainants' above prayer for relief is allowable against said Harry C. Westover and since he is the sole defendant herein, this proceeding should be dismissed.

II.

The above prayer for relief appearing at pages 13 and 14 in the Complaint herein filed and especially paragraphs 1 and 2 of such prayer seeks an adjudication herein with respect to the rights of an alleged benevolent trust estate described as the Dr. William D. Noland Trust Estate, Ltd., of which William D. Noland, H. K. Miller and Harry R. Maxwell are alleged to be the trustees. All of the above trustees and the foregoing trust are indispensable parties plaintiff, but none [3] of the above trustees have appeared herein with the possible exception of William D. Noland, and if he has **appeared herein as trustee, such appearance would not be valid or authorized in view of his adverse interest with respect to the above trust as shown by the complaint herein, and other papers herein filed by Complainants.** Since the only plaintiff validly appearing herein is William D. Noland in his individual capacity, there is an absence of indispensable parties plaintiff as to all of the other plaintiffs or Complainants named in the Complaint herein, and in view of the absence of the above indispensable parties plaintiff, the Court lacks jurisdiction of the above entitled action, which relates to the foregoing trust and trustees.

III.

The above prayer for relief appearing at pages 12 and 14 of the Complaint herein filed and especially the first three paragraphs thereof in effect seeks a declaratory judgment with respect to various liabilities for Federal taxes and the seeking of such relief violates Section 274d. of the Judicial Code (Section 400, Title 28, U.S.C.A.) as more particularly set forth in the Memorandum of Points and Authorities supporting this motion and hereto attached.

IV.

The Complaint filed in the above entitled action fails to state a claim upon which relief as prayed for in Complaint or any other relief can be granted against the above defendant.

V.

The above prayer for relief appearing on pages 13 and 14 of the Complaint herein filed seeks a refund with respect to the above mentioned alleged payments of \$80.45 and \$35.64 but as shown by pages 1, 2, 3 and 4 of Complainants' above Exhibit I, the refund claims in question were executed by William D. Noland on behalf of the aforementioned trust. The above defendant hereby repeats and incorporates herein by reference the statements in the above ground II hereof to the effect that this trust could not validly take action as to these matters re-

lating to the trust unless the aforementioned three trustees act "collectively" as [4] contemplated by the trust agreement and furthermore any action with respect to the tax liabilities of the above trust could not validly be taken by William D. Noland alone since he had an adverse interest against the above trust as set forth in ground II in support of this Motion and appearing at pages 2 and 3 hereof. The above refund claims filed March 15, 1946, were accordingly invalid and for lack of proper refund claims no refund with respect to the foregoing amounts may be made under Section 322(b) (1) and (2) of the Internal Revenue Code as more particularly set forth in the memorandum supporting this Motion. In any event the above payment of \$80.45 as shown by page 1 of Complainants' above Exhibit I related to the taxable year from January 1, 1937 to December 31, 1937, and such payment was made on July 6, 1942. This payment was accordingly made more than three years prior to March 15, 1946 (the date of the filing of the refund claim for such amount of \$80.45 as shown by page 1 of Complainants' above Exhibit I). Since the above page 1 of Exhibit I shows that this \$80.45 payment for the year 1937 was made more than three years prior to the above filing of the refund claim on March 15, 1946, any refund with respect to such amount of \$80.45 or any part thereof has been barred by the above Section 322(b) (1) and (2), and therefore this action and the bill of complaint must in any event be stricken and dismissed at least

with respect to those parts thereof dealing with the above payment of \$80.45. Defendant does not waive however the various grounds hereinbefore mentioned upon which he prays that this action and the above bill of complaint be dismissed in their entirety.

This Motion is based upon the files, pleadings, exhibits and memoranda in this case, upon the points and authorities filed by the above defendant concurrently herewith, upon such other points [5] and authorities as may hereinafter be filed by this defendant and upon oral argument.

Dated: September 5, 1947.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL and
GEORGE M. BRYANT,
Assistant United States
Attorneys.

EUGENE HARPOLE and
LOREN P. OAKES,
Special Attorneys
Bureau of Internal Revenue.

By /s/ LOREN P. OAKES.

Attorneys for Defendant Harry C. Westover, Collector of Internal Revenue for Sixth Collection District of California.

[Title of District Court and Cause]

EXHIBIT "A"

AFFIDAVIT IN SUPPORT OF MOTION TO
DISMISS

State of California,
County of Los Angeles.—ss.

Harry C. Westover, being first duly sworn, deposes and says:

I am the Collector of Internal Revenue for the Sixth Collection District of California with offices in the Federal Building, Los Angeles, California. I commenced my duties as such Collector on July 1, 1943, and prior to that date I never held the office of nor acted as a Collector of Internal Revenue for the United States of America in the Sixth Collection District of California or elsewhere.

/s/ HARRY C. WESTOVER.

Subscribed and sworn to before me this 5th day of September, 1947.

(Seal) /s/ C. M. COMMINS,
Notary Public in and for said County and State.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed Sept. 6, 1947. [7]

[Title of District Court and Cause]

OBJECTION TO MOTION TO DISMISS

Comes now the complainants William D. Noland, Trustee, Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, and William D. Noland, personal, and objects to motion to dismiss as made by defendant, as motion to dismiss is not correct as to law.

This objection is supported by memorandum of points and authorities filed herewith, and all papers filed herein in the files.

Dated: Los Angeles, Calif., Sept. 9, 1947.

Respectfully Submitted,

/s/ WILLIAM D. NOLAND

Trustee, Dr. William D. Noland Trust Estate, Ltd.,

A Benevolent Trust Estate. In Propia Persona.

Exhibit "A" attached hereto in support of this objection and made a part hereof.

/s/ WILLIAM D. NOLAND,

Personal, In Propia Persona.

EXHIBIT "A"

In the District Court of the United States,
Southern District of California,
Central Division.

No. 5716-w—Civil

WILLIAM D. NOLAND, H. K. MILLER and
HARRY R. MAXWELL, Trustees, Dr. Wil-
liam D. Noland Trust Estate, Ltd., a benevolent
trust estate, and WILLIAM D. NOLAND,
Complainants.

vs.

GEORGE D. MARTIN, Internal Revenue Agent
in Charge, United States Treasury Department,
Internal Revenue Service, Sixth Collection Dis-
trict of California, Los Angeles Division; NOR-
MAN HAYWARD, Internal Revenue Agent;
JOSEPH D. NUNAN, JR., Commissioner, in-
ternal Revenue Service; RAYMOND B. SUL-
LIVAN, Acting Internal Revenue Agent; and
JOHN H. CRAMER, Internal Revenue Agent,
Defendants.

ORDER AND JUDGMENT OF DISMISSAL AS
TO DEFENDANTS GEORGE D. MARTIN,
NORMAN HAYWARD, RAYMOND B.
SULLIVAN, and JOHN H. CRAMER,
INTERNAL REVENUE AGENTS

On November 19, 1946, the said defendants,
George D. Martin, Norman Hayward, Raymond B.
Sullivan and John H. Cramer, Internal Revenue

Agents (hereinafter referred to as the above four defendants) filed a Motion moving the Court to dismiss the above action as to them upon grounds set forth in such Motion including the ground that the Complaint herein fails to state facts sufficient to justify the issuance of an injunction or the granting of any injunctive relief whatsoever herein, and the further ground that such Complaint fails to state a claim upon which relief as prayed for in the Complaint or [10] any other relief can be granted against the above four defendants or any of them.

The matter of the foregoing Motion by the above four defendants having regularly come on for hearing on December 4, 1946, before the Honorable Jacob Weinberger, Judge presiding therein, and the Complainant William D. Noland appearing in propria persona on behalf of himself individually, and also as trustee of the above Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, and the above four defendants appearing by James M. Carter, E. H. Mitchell and Loren P. Oakes, counsel for such defendants, and all matters relating to the above Motion having been submitted to the Court for its decision, and the Court having considered the pleadings and other papers herein filed and heard the arguments of the Complainant William D. Noland appearing in the capacities above stated and of counsel for the above four defendants concerning the foregoing matter, and the Court being fully advised in the premises, and by

virtue of the law, the matters aforesaid and the grounds hereinafter mentioned, now renders its decision as follows:

It Is Hereby Ordered, Adjudged And Decreed:

1. That the application and prayer in the Complaint and proceedings herein for and injunction or any type of injunctive relief whatsoever is hereby denied on the grounds (a) that the Complaint herein filed does not state a claim upon which relief can be granted by the issuance of any type of injunction or injunctive relief, (b) that it does not appear that any irreparable injury, loss or damage will result from the failure to issue any type of injunction or injunctive relief, and (c) as to the grounds set forth in the Complaint in connection with the Prayer for injunction or injunctive relief, the Complainants have plain, speedy and adequate remedies at law to such an extent that this Court cannot properly grant any type of injunction or injunctive relief as prayed for in the Complaint herein.

2. That the above action not only with respect to the injunctive [11] relief therein prayed, but also as to all of its other aspects and in its entirety, is hereby dismissed as to the above four defendants on the ground that the Complaint herein filed fails to state a claim upon which relief as prayed for in the Complaint or any relief can be granted against said four defendants or any of them.

3. That the said defendants, George D. Martin, Norman Hayward, Raymond B. Sullivan and John

H. Cramer, Internal Revenue Agents, shall have judgment for and shall recover from the said Complainant William D. Noland individually and as trustee of the said Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, in the amount of the costs of said defendants, to be taxed by the Clerk of this Court in the sum of \$.

4. That the Clerk of this Court shall enter this Order and Judgment of Dismissal.

Dated: This 9th day of January, 1947.

/s/ JACOB WEINBERGER,

United States District Judge.

[Endorsed]: Filed Sept. 10, 1947.

[Title of District Court and Cause.]

SECOND AMENDED BILL OF COMPLAINT

Comes now William D. Noland, Trustee, representing his interest as such trustee, in Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, and other trustees of the board of trustees for said benevolent trust estate, are H. K. Miller and Harry R. Maxwell, and said benevolent trust estate is organized and established by contract, by and between the said trustees under the provisions of the Constitution of the United States of America, the said contract provides that the said trustees shall act under their citizenship rights, common law rights of contract, and under the provisions of the said Constitution of the United States of America, and the said trustees, shall carry out their [13]

trust as a benevolent trust estate as provided under the terms and conditions of the contract under which said benevolent trust is established as a charitable organization, and the said trustee William D. Noland is a party to the contract under which the said benevolent trust estate is established, therefore, the said William D. Noland, Trustee, is representing his interest in said contract, and William D. Noland personally is representing himself personally, and as a trustee and personal, complains in this second amended bill of complaint against the defendants and each of them, for a cause of action, as follows, to wit:

1.

The contract under which the aforesaid benevolent trust estate is established and organized was written by the late Franklin P. Bull, commonly known as Judge Bull, who prior to his passing in death, had practiced law in the State of California for over a period of fifty years, and the trustees for said benevolent trust estate, have offices at 2030 Wilshire Blvd., Suite 201-205, Los Angeles 5, California.

2.

The defendants Harry C. Westover, Collector, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division; George D. Martin, Internal Revenue Agent in Charge, United States Treasury Department, Internal Revenue Service,

Sxith Collection District of California, Los Angeles Division; Norman Hayward, Internal Revenue Agent, Los Angeles, California; Raymond B. Sullivan, Acting Internal Revenue Agent, Los Angeles, California; and John H. Cramer, Internal Revenue Agent, Los Angeles, California; have offices at 417 South Hill Street, Los Angeles, California, and fictitious named defendants, John Doe, Jane Doe and others individually and collectively, Does 1 to 10, the correct names and addresses of whom are unknown at this time to complainants, [14] and when correctly known complainants will respectfully beg leave of the Court to amend this second amended bill of complaint and substitute the correct names and addresses of said fictitious named defendants.

3.

For the jurisdiction of this cause and action in the above entitled court, federal statutes and federal questions are involved, and the damages, losses and injuries caused by fraud to complainants are in excess of Three Thousand (\$3,000.00) Dollars over and above all costs and attorney fees in the prosecution of this cause and action in the above entitled court.

4.

That on or about July 6, 1942, Norman Hayward, Internal Revenue Agent and collector for United States Treasury Department, Sixth Collection District of California, Los Angeles Division, had made several calls prior to said date and after said date

of July 6, 1942, at the office of complainants, at 3944 Wilshire Blvd., Los Angeles, California, and the said Norman Hayward upon his first call at the said office of complainants, on or about June 6, 1942, demanded that he have possession of the trustees books and records of the aforesaid Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, for the purpose to go over and examine said books and make a report from said books as to his findings to the Internal Revenue Service, Treasury Department of the United States, threatening that if he was not furnished the said books and records and allowed to examine same, that he would have warrants issued against William D. Noland, one of the trustees, of the board of trustees for the said Dr. William D. Noland Trust Estate, Ltd., and the said books and records of the aforesaid trustees and complainants were produced to the said Norman Hayward, defendant herein, and Internal Revenue Agent, and he proceeded to read and check in all detail the [15] said trustees books and records, spending several days at the office of aforesaid trustees and complainants hereof in examining and going over the said books and records.

5.

That during the aforesaid several days time consumed in examining and going over the aforesaid trustees books and records by the aforesaid Norman Hayward, defendant and Internal Revenue Agent and Collector, the said Norman Hayward in making

up a schedule of taxation as an additional tax, to correspond with his personal views of a schedule for additional taxation for the years of 1937, 1938, 1939, 1940 and 1941, he wilfully and maliciously, with malice aforethought, through and by fraud, fraudulently confiscated, assets, funds and property belonging to the aforesaid benevolent trust estate, namely, Dr. William D. Noland Trust Estate, Ltd., from the said trustees books and records, and fraudulently assigned, transferred and delivered said assets, funds and property belonging to and owned by the said benevolent trust estate in a schedule to the personal account of William D. Noland personally, and in this manner of fraud, the said Norman Hayward fraudulently made a personal additional income taxation against William D. Noland personally, in the sum of \$401.03, for the said years of 1937, 1938, 1939, 1940 and 1941, after the said trustees had made tax returns for the said benevolent trust estate, for the said years.

6.

The aforesaid Norman Hayward, defendant and Internal Revenue Agent and Collector, after going over and examining the said trustees books and records, and after making the aforesaid fraudulent confiscations, assignments, transfers and deliveries of the assets, funds and property belonging to the aforesaid benevolent trust estate to the personal account of William D. Noland personally, a com-

plainant hereof, the said Norman Hayward then further demanded [16] with a threat of issuing warrants, the payment of aforesaid fraudulent additional taxation he unconstitutionally had created against William D. Noland personally, and then the said Norman Hayward accepted the sum of \$80.45 in payment of the said additional taxation he had created against the personal account of William D. Noland complainant for the year of 1937, and the said additional taxation was thus fraudulently established against the personal account of said complainant for the said year of 1937 by the said Norman Hayward, Internal Revenue Agent, in conflict with \$63.85, which the said Norman Hayward formerly created through and by fraud as income tax for the year of 1937, by and through his fraudulent assignments, transfers and deliveries as made by the said Norman Hayward from the trustees books and records of the assets, funds and property belonging to the aforesaid Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, to the personal account of said William D. Noland complainant, for the purpose of fraudulently establishing and collecting an additional income tax from William D. Noland personally, in addition to the returns and reports for income tax as made and paid in error by the trustees of the board of trustees for said Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, and the said Norman Hayward gave a receipt for the aforesaid \$80.45, a copy of which is filed herewith as an exhibit.

7.

Complainants further allege, that George D. Martin, Internal Revenue Agent in Charge, and John H. Cramer, Internal Revenue Agent, both of whom are defendants herein, under date of January 26, 1945, in a letter addressed to Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, William D. Noland, Trustee, with statements attached to said letter showing that assets, funds and property belonging to the said Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, were [17] fraudulently confiscated and assigned, transferred and delivered to the account of William D. Noland personally, with a provision in said attached statements that William D. Noland personally must pay an additional personal income tax of \$656.75 for the year of 1942, said statements was dated November 3, 1944, and complainants contend that the procedure herein of taking the assets, funds and property of the said benevolent trust estate and charging same to the account of complainant William D. Noland, is unconstitutional confiscation of property without due process of law.

8.

Complainants William D. Noland, Trustee, and William D. Noland personally, that upon receipt of the aforesaid letter dated January 26, 1945, from the aforesaid George D. Martin, Internal Revenue Agent in Charge, which was a notification to the aforesaid trustees of the board of trustees for the

aforesaid benevolent trust estate, that an additional income tax of \$1,114.86 totally was due which was created by an additional income tax of \$1,061.77, plus a penalty of \$53.09, attached to said letter of January 26, 1945 was a statement signed by John H. Cramer, Internal Revenue Agent, setting forth an additional income tax of \$656.75 for the year of 1942, and the said \$1,114.86 being an additional income tax for the year of 1943, as additional income taxes against William D. Noland personally, which had been created by the aforesaid Internal Revenue Agents, by the aforesaid fraudulent confiscations, transfers, assignments and deliveries of the assets, funds and property from the aforesaid benevolent trust estate without the consent of the trustees to the account of William D. Noland personally, and said unconstitutional confiscations of property belonging to said benevolent trust estate was further done without due process of law.

9.

Complainants further allege, that upon receipt of the aforesaid [18] notifications and letters advising that additional income taxes had been assessed in the manner aforesaid, complainants hereof, filed a protest with aforesaid Internal Revenue Agents and Service, and with aforesaid Internal Revenue Agent in Charge, protesting the aforesaid assignments, transfers and deliveries of the assets, funds and property from the ownership of aforesaid benevolent trust estate to the account of William D. Noland Personally for the purpose of

additional income taxation, and after numerous hearings before the said Internal Revenue Service and Department, on or about December 29, 1945, a letter addressed to William D. Noland was received from the said Internal Revenue Service, of 417 South Hill Street, Los Angeles 13, California, notifying the said William D. Noland complainant herein, of a deficiency of an additional income tax liability in the sum of \$1,245.13 and a penalty of \$62.26, which was shown in a statement attached to said letter, for the taxable year ended December 31, 1943, and said was signed by Joseph D. Nunan, Jr., Commissioner of Internal Revenue, and also signed by Raymond B. Sullivan, Acting Internal Revenue Agent in Charge.

10.

Complainants hereof, William D. Noland, Trustee, and William D. Noland, Personally, further allege that within ninety (90) days after hearing of protest before aforesaid Internal Revenue Service and Department, and receiving the aforesaid letter dated December 29, 1945, that complainants filed a petition for hearing on appeal for a redetermination of the aforesaid income tax matters in controversy to the Tax Court of the United States, at Washington, D. C., and that on or about August 2, 1946, the said Tax Court of the United States, ruled and held that respondent's motion to dismiss for lack of jurisdiction be granted, and the tax matters in relation to aforesaid income tax controversy was dismissed by the said Tax Court of the United States. [19]

11.

Complainants further allege, that the business involved herein, is conducted and operated under the aforesaid benevolent trust estate as a charitable organization and institution, for the benefit of poor people and poor children, who have no money with which to pay for service such as is given to said poor people and poor children by said charitable organization and as such the said benevolent trust estate has been in continual operation conducting this charitable and benevolent work since June 1, 1935, and is now operating as such charitable organization, caring for the beneficiaries of said benevolent trust estate, who are the said poor people and poor children.

12.

Complainants further allege, that the aforesaid benevolent trust estate and charitable organization, operates under a contract made and entered into by and between the trustees of the board of trustees for said benevolent trust estate, and also under another contract made and entered into by and between the trustees hereof and William D. Noland as a Doctor of Chiropractic, wherein said William D. Noland gives his services without any salary, wages, or profit, for the benefit of the aforesaid poor people and poor children, and both of the said contracts are made and entered into under the provisions of the Constitution of the United States of America, wherein the said benevolent trust estate is

administered by natural person trustees in joint tenancy, holding in trust as to distribution of avails, acting under citizenship, common law rights of contract, constitutional rights, federal laws and immunities vouchsafed to all persons, as set forth and provided in and by the Constitution of the United States of America, in a benevolent and charitable manner for the purpose of caring for poor people and children to give them health when they have no funds to pay for service urgently required. [20]

13.

Complainants further allege, that the aforesaid Internal Revenue Agents, set forth and claim as set forth in exhibit hereof, that Section 167 of the Federal Internal Revenue Code, as cited by said Internal Revenue Agents on page 3 of Exhibit F filed herewith in support of this second amended bill of complaint, the said Revenue Agents claiming where the Trustee, Trustor and Beneficiary are one and the same, the income is taxable to the Trustor, which is particularly alleged by the aforesaid defendant John H. Cramer, Internal Revenue Agent, on page 3, of Exhibit E filed herewith, also claiming the said section 167 supports the aforesaid Internal Revenue Agents of the Federal Internal Revenue Service, in their making the aforesaid fraudulent unconstitutional confiscations, assignments, transfers and deliveries of the assets, funds and property belonging to and owned by the aforesaid benevolent trust estate, namely, Dr. William

D. Noland Trust Estate, Ltd., to the account of William D. Noland personally, for the purpose of creating and establishing aforesaid additional income taxes, pursuant to returns and reports on income taxes having been made and paid in error by the trustees for said benevolent trust estate.

14.

Complainants further allege, and contend, that the aforesaid section 167, of the Federal Internal Revenue Code, is not applicable to and does not apply to the said benevolent trust estate, namely, Dr. William D. Noland Trust Estate, Ltd., which is organized as charitable institution under the provisions of the Constitution of the United States by a contract by and between the trustees, and a contract by and between the trustees and William D. Noland, as a Doctor of Chiropractic, and there are also numerous beneficiaries, therefore, the trustee, trustor and beneficiary are not one and the same, as claimed by the aforesaid [21] John H. Cramer and aforesaid Internal Revenue Agents, and the said Section 167 of the Federal Internal Revenue Code as cited by said Internal Revenue Agents is not applicable to the matters involved herein and complainants further contend that the said section 167 is of no support to the claims and contentions of the said and aforesaid Internal Revenue Agents, in the matter of William D. Noland Trustee, for Dr. William D. Noland Trust Estate, Ltd., a benevolent trust, and William D. Noland personally, for

additional income taxation in the manner in which said Internal Revenue Agents have attempted to create and establish said additional taxation.

15.

Complainants further allege, that the income tax returns for the aforesaid benevolent trust estate, namely, Dr. William D. Noland Trust Estate, Ltd., for the years of 1937, 1938, 1939, 1940, 1941, 1942, 1943 and all following years have been consecutively filed with the Internal Revenue Service of the United States for each of the said years for said benevolent trust estate, wherein the aforesaid Internal Revenue Agents have made aforesaid fraudulent unconstitutional confiscations, assignments, transfers and deliveries from the assets, funds and property belonging to the aforesaid benevolent trust estate, to the personal account of complainant William D. Noland personally for the purpose of creating additional income taxes without the consent and permission of the trustees for said benevolent trust estate, and further without the consent and permission of William D. Noland, Trustee, and William D. Noland personally.

16.

Complainants further allege, that the aforesaid fraudulent and unconstitutional confiscations, transfers, assignments and deliveries of the assets, funds and property belonging to said benevolent trust estate, a charitable institution and organization, were made and based upon a false and fraudulent

report made by the aforesaid [22] defendant Norman Hayward, Internal Revenue Agent and Collector, as set forth herein, for the purpose of creating additional income taxation by aforesaid and said fraudulent unconstitutional confiscations, assignments, transfers and deliveries from the said benevolent trust estate to the personal account of William D. Noland personally, a complainant hereof.

17.

Complainants further allege, that the trustees of the board of trustees for the aforesaid benevolent trust estate, in making the federal income tax returns for the year of 1942, they paid in error the sum of Thirty-five and 64/100 (\$35.64) Dollars, and for the year 1945 they paid the sum of One Hundred Eighty Three and 36/100 (\$183.36) Dollars. to the Internal Revenue Service at Los Angeles, California, and that under date of March 8, 1944, complainants received a letter addressed to Dr. William D. Noland Trust Estate, Ltd., William D. Noland, Trustee, advising the aforesaid trustees for the aforesaid benevolent trust estate, in relation to a credit of \$8.91 paid 9-15-43, that when filing the 1943 income tax return for the said benevolent trust estate, to attach carbon copy of said letter to the face of form 1041 for identification with the overpayment being held in a suspense account, which is to be credited to said form 1041, and the said letter was signed by Harry C. Westover, Collector, by W. H. Pearson, Cashier, and

complainants contend that the said amounts of \$35.64 and \$183.36, paid as income taxes for the years of 1942 and 1943 have been paid in error by the aforesaid trustees of the said benevolent trust estate to the aforesaid Internal Revenue Service, which said amounts total the sum of \$219.00, and complainants contend that the said amount was not owed to the said Internal Revenue Service nor any other amount as income tax was owing or due to the said Internal Revenue Service by the trustees for said benevolent trust estate, nor by the complainants hereof. [23]

18.

Complainants further allege, that claims were filed with the aforesaid Internal Revenue Service for the amounts of the aforesaid \$35.64 and \$80.45 on or about March 15, 1946, at Los Angeles, California, and to date the said Internal Revenue Service have not affirmed or denied said claims.

19.

Complainants further allege, that William D. Noland is not paid and does not receive any salary, wages or profits from the aforesaid benevolent trust estate, and that his personal living expenses are paid from the funds of the said benevolent trust estate as benevolent trust expense.

20.

It is further alleged by the complainants hereof, that during the time that case No. 5716-W, William D. Noland et al., trustees, vs. George D. Martin,

Internal Revenue Agent in Charge, et al., was pending in the above entitled United States District Court, and said action was a personal damage action having no connection with this said above entitled action, that the aforesaid trustees of the board of trustees for the aforesaid benevolent trust estate, received another notice and statement for additional income taxes due and payable, dated December 11, 1946, in the sum of \$1245.13, penalty \$62.26, interest \$202.09, making a total sum of \$1509.48 for the year of 1943, and also under the date of March 28, 1947, another notice and statement was received by the said trustees, of income tax due as a balance due on the year of 1942 income tax amounting to the sum of \$19.85, after the aforesaid income taxes for the years 1937 in the sum of \$80.45 and 1942 in the sum of \$35.64 were paid as aforesaid.

21.

Complainants further allege, that there was further received under the date of March 28, 1947, another tax notice and [24] statement for the sum of \$19.65 as income taxes due and payable for the year of 1942, as a balance of income tax due and payable, as aforesaid with threats of enforcing collection of aforesaid amounts as claimed as additional income taxes, and the aforesaid case No. 5716-W in the above entitled United States District Court was dismissed on or about January 9, 1947, without prejudice, and complainants contend and claim that due to the fact that the aforesaid benevolent trust estate, operates and conducts all business

as a benevolent and charitable organization without profit, and is a non-profit and charitable organization, that complainants do not owe said or aforesaid amounts paid or charged by aforesaid Internal Revenue Agents as income taxation, and although some of the income taxes have been paid, with and without interest, the complainants do not and did not owe such income tax as was paid, as it was paid in error by the complainants.

22.

Complainants further allege, that on or about June 29, 1947, complainants received under date of June 27, 1947, a further notice and statement demanding an additional income tax for the year of 1943, in the sum of \$1509.48, with interest in the sum of \$51.72, which made a total sum of \$1561.20, against the aforesaid benevolent trust estate, namely, Dr. William D. Noland Trust Estate, Ltd., and complainants contend that the said amount of \$1561.20 is not due and owed as income tax to the aforesaid Internal Revenue Agents and Service, and any amounts which have been paid as income taxes by complainants, William D. Noland, Trustee, or William D. Noland personally, have been paid in error, and complainants contend that they do not owe any of the aforesaid amounts which have been claimed for income taxes by the aforesaid Internal Revenue Agents and Service, because this amended complaint and the exhibits filed herewith in support of said complaint and the law clearly show no income tax is owed. [25]

23.

Complainants further allege, and contend, that Section 167, of the Federal Internal Revenue Code, which provides, that where the trustor, trustee and beneficiary, in a trust estate, are one and the same, the income taxes are charged to and payable by the trustor, which said Section 167, is cited by the aforesaid Internal Revenue Agents and Service, in support of the aforesaid charges and demands made by the said Internal Revenue Agents, for additional income taxes, and complainants contend that the said Section 167 does not apply to the aforesaid benevolent trust estate, namely, Dr. William D. Noland Trust Estate, Ltd., because the trustor, trustee and beneficiary are not one and the same, and that instead the said benevolent trust estate, has a board of trustees, which are plural in numbers, and it shown by this complaint and exhibits, that there are more than one trustee, and a board of trustees, and that there are numerous beneficiaries, therefore, the said Section 167 does not apply to the said benevolent trust estate and complainants hereof.

24.

Complainants further allege and contend, that the contract and agreement under which the aforesaid benevolent trust estate, is organized and established, a copy of which is filed herewith as exhibit A shows that it is a benevolent and charitable organization, for the benefit of poor people and children, and the said benevolent and charitable work for said poor people and children have been carried

on since June 1st, 1935, and is now being carried on, and the said benevolent trust estate and charitable work, is supported by the Federal Internal Revenue Code of the United States of America, particularly, under Title 26, Internal Revenue Code, Section 23, Deductions from gross income, and in computing net income there shall be allowed as deductions: (a) expenses; (1) In general. (o) Charitable and other contributions; (2) charitable [26] organizations, and Section 120 under said Title 26, Internal Revenue Code, provides unlimited deductions for charitable and other contributions, and complainants contend that under Title 26, Internal Revenue Code, Section 23, Subd. (a) Par. (1), Subd. (o) Par. (2), and Section 120, are the laws which govern the operations of the aforesaid benevolent trust estate and the complainants hereof, and section 167 of the Federal Internal Revenue Code is not applicable in any shape form or manner to the said benevolent trust estate and complainants.

25.

Complainants further allege and contend, that the assets, funds and property belonging to the aforesaid benevolent trust estate, namely, Dr. William D. Noland Trust Estate, Ltd., which have been assigned, transferred and delivered to the account of William D. Noland personally, by the aforesaid Internal Revenue Agents for the aforesaid Internal Revenue Service, for the purpose of additional income taxation, as shown by this complaint and exhibits filed herewith in support of said complaint,

are fraudulent unconstitutional confiscations of the assets, funds and property belonging to the said benevolent trust estate, and complainants contend that they do not owe any of the aforesaid amounts which have been paid and charged to the said benevolent trust estate, William D. Noland, Trustee, and William D. Noland, personal, as all such charges for income tax against complainants hereof for income tax and additional income tax are fraudulent and unconstitutional and in violation of the aforesaid sections and subdivisions of the Internal Revenue Code and also in violation of the Constitution of the United States under the provisions for contracts and due process of law.

26.

Complainants further allege and contend, that the assets, funds and property belonging to the aforesaid benevolent trust estate, [27] which have been assigned, transferred, and delivered to William D. Noland personally for additional income taxation by the aforesaid Internal Revenue Agents have been done so without the consent and permission of the complainants and trustees of the board of trustees for said benevolent trust estate, and the complainants contend that the aforesaid and said assignments, transfers and deliveries of property, funds and assets of said benevolent trust estate, to the personal account of William D. Noland personally, are fraudulent unconstitutional confiscation of the said assets, funds and property by the afore-

said Internal Revenue Agents and the Internal Revenue Service without due process of law.

Wherefore, complainants pray for process and judgment as follows:

1. That Section 167 of the Federal Internal Revenue Code does not apply to the aforesaid benevolent trust estate, namely, Dr. William D. Noland Trust Estate, Ltd., nor to the complainants, William D. Noland, Trustee, or William D. Noland personally, and that any attempt to apply or make such application of said Section 167, to said benevolent trust estate or complainants is null and void of such application and of no effect whatsoever.

2. That complainant William D. Noland, Trustee, for aforesaid benevolent trust estate, does not have to file any income tax return and that the said complainants William D. Noland, Trustee, and William D. Noland personally, do not owe the Internal Revenue Service or its Agents any income taxes of any kind whatsoever.

3. That since William D. Noland personally has made and executed a contract with the trustees of aforesaid benevolent trust estate, as a charitable organization, to give his skill, knowledge and labor to the said benevolent trust estate and its trustees, for the benefit of the beneficiaries who are poor people and children who are unable to pay for health service; without [28] salary, wages or profit, and that said contract is a valid and lawful contract and that the complainant William D. Noland had a lawful right to make said contract, therefore, the

said complainant does not owe any income taxes, as there is no income from salary, wages or profit from the said benevolent trust estate.

4. That complainant William D. Noland, Trustee, is a party to the contract under which the aforesaid benevolent trust estate is established and that it be adjudged and decreed that the said contract is a valid and lawful contract, and that the said benevolent trust estate is a charitable organization.

5. That it be adjudged and decreed that the matters which are involved herein, are subject to the provisions under Title 26, Internal Revenue Code, Section 23, Subdivision (a) Paragraph (1), Subdivision (o) Paragraph (2), and Section 120, as the law that governs and rules instead of Section 167 of the Federal Internal Revenue Code.

Wherefore, complainants pray for such other order, orders, aid and relief as the court may deem proper and just in the premises.

Dated: Los Angeles, California, April 15, 1948.

/s/ WILLIAM D. NOLAND,

Trustee, Dr. William D. Noland Trust Estate, Ltd.,
a Benevolent Trust Estate. In Propia Persona.

/s/ WILLIAM D. NOLAND,

Personal. In Propia Persona.

(Duly Verified.)

Exhibits A to I inclusive filed herewith in support of this second amended bill of complaint.

Received copy of the within second amended bill of complaint this 19th day of April, 1948.

/s/ JAMES M. CARTER,

By /s/ VELORUS BONHUS,

Attorney for

[Endorsed]: Filed April 19, 1948. [30]

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF SECOND
AMENDED BILL OF COMPLAINT

State of California.

County of Los Angeles—ss.

William D. Noland, Trustee, and William D. Noland, Personal, being first duly sworn, deposes and says: That the attached copy of the Benevolent Trust Estate, namely, Dr. William D. Noland Trust Estate, Ltd., is a true and correct copy of the original contract and it was recorded in public recording offices of Arizona and California, following the execution of contract establishing said Benevolent Trust Estate, and is marked "Exhibit A" for identification in support of Second Amended Bill of Complaint.

/s/ WILLIAM D. NOLAND,
Trustee.

/s/ WILLIAM D. NOLAND.
Personal.

Subscribed and sworn to before me on this 9th day of April, 1948.

/s/ RICHARD M. GOUGH,
Notary Public, in and for the County of Los Angeles, State of California.

My commission expires May 18, 1948. [31]

EXHIBIT "A"

A BENEVOLENT TRUST ESTATE

Contract and Agreement Embodying the Following Terms, Conditions, Stipulations, Acceptance and Covenants to Establish a Benevolent Trust Estate to be Administered by Natural Person Trustees in Joint Tenancy, Holding in Trust as to Distribution of Avails, Acting Under Citizenship, Common Law Rights of Contract, and Constitutional Rights, Federal Laws and Immunities Vouchsafed to All Persons, as Set Forth and Provided in and by the Constitution of the United States of America.

The business name of the Trustees is Dr. William D. Noland Trust Estate, Ltd., with Executive Offices and Headquarters, 311 North Second Avenue, Phoenix, Arizona, U.S.A., and a branch office located at 3944 Wilshire Boulevard, Los Angeles, California.

This Conveyance, Acceptance, Stipulation and Covenant, made and entered into this first day of June, 1935, by and between William D. Noland, Peggy A. Archer and Audney E. Spillman, each of whom are citizens of the United States and residents therein.

William D. Noland, hereinafter designated as the Conveyer, who conveys, transfers, assigns, sells and delivers unto the said named persons herein, property to constitute the initial benevolent trust estate, and the said

William D. Noland, Peggy A. Archer and Aud-

Exhibit "A"—(Continued.)

ney E. Spillman each of whom are herein, hereby and hereinafter designated as the Trustees of this estate, and hereby the joint tenancy holders, who, with associate or successor trustees, are by virtue herein to act collectively under the business name herein designated.

Witnesseth:

That, for and consideration of One Dollar (\$1.00), and other valuable consideration, the objects and purposes herein, the aforesaid Conveyor does hereby assign, sell, convey, transfer and deliver unto the said named [32]

William D. Noland, Peggy A. Archer and Audney E. Spillman, Trustees of the Board of Trustees of this Benevolent Trust Estate, created and established by this contract and agreement, the property assigned, conveyed and sold, delivered herein to aforesaid Dr. William D. Noland Trust Estate, Ltd., to constitute the initial benevolent trust estate, is herewith described as follows to-wit:

ROOM No. 1	6 Ash Trays
1 Chesterfield	1 Coffee Table
1 Radio	
1 End Table	
1 Gas Heater	ROOM No. 2
2 Lamps (1 floor) (1 table)	2 Chairs (easy)
3 Occasional Chairs	1 Occasional Table
1 Ottoman	1 Magazine Rack
1 Large Easy Chair	1 Tapestry
7 Pair Curtains	2 Pair Curtains
2 Pair Drapes	1 Pair Draw Drapes
1 Rug—9'x12'	1 Screen
1 Rug—6'x8'	2 Flower Bowls
3 Scatter Rugs	2 Flower Holders

Exhibit "A"—(Continued.)

ROOM No. 3	ROOM No. 4—(Cont'd)
2 Office Desks	1 Otoscope (set complete) (Welch-Allen)
1 Typewriter	1 Utility Kit
1 Typewriter Stand	3 Probes (metal)
3 Occasional Chairs	3 Applicators (metal)
3 Ash Trays	2 Grooves
5 Pair Curtains	3 Bandage Shears
3 Pair Drapes	4 Tweezers
1 Gas Heater	2 Surgical Lances
1 Treating Table	4 Instrument Knives
1 Obstetrical Table	3 Vaginal Speculums
3 Chairs (straight)	3 Rectal Speculums
3 Pair Drapes	8 Hemostats (throat, Vaginal, Rectal)
3 Mirrors (plate glass)	3 Speculums (nasal)
3 Dressing Tables	2 Concurror (Diagnosal)
1 Rug—9'x12'	1 Blue Sunlight Glass Set with Focalizers Complete (Re- flector)
1 Runner—27"x9'x3"	2 Sets "PH" Indicators (lit- masin) P H
2 Office Desk Chairs	1 Set Urinalcalysis Testers
1 Rug Silencer	2 Applicator Containers (Chrome)
1 Waste Paper Basket	1 Cotton Container (metal)
1 Telephone Stand	14 Glass jars with Covers (Asst. sizes)
2 Pillows	1 Replaca (inst)
2 Blankets	6 Wine Glasses
1 Cow Hide, felt and scrap leather	4 Eye Cups
1 Set for Orthopedic Work	3 Graduates—20 C.C.
	3 Morton
	3 Funnels—2
	2 Atomizers eqp.
	2 Atomizers ear
	2 Atomizers eqp.
	2 Magnifying Glass
	2 Stethoscopes
	1 Pair Goggles
	(Full stock of Chemicals, Herbs, Drugs for Emergencies, band- ages, cotton, etc.)
	200 Towels—"Huck"
	24 Turkish Towels
	4 Pair Curtains
	4 Professional Gowns
	18 Sheets
	12 Pillow Cases

ROOM No. 4

- 1 Instrument & Medical Cabinet
- 1 Mayo Table
- 1 Gas Heater
- 2 Straight Chairs
- 2 Electric Heaters
- 1 Sterilizer
- 2 Trash Cans
- 1 Spot Stand Lamp
- 1 Treatment Table
- 1 Utility Table
- 1 Utility Cabinet
- 1 Towel Hamper
- 1 Infra-Red Ray Lamp
- 4 Utility Pans
- 1 Mirror (plate glass)
- 2 Tri-way Irrigators
- 2 Chemical Bags (fountain)
- 6 Douche—6 Colon tubes
- 2 Ice Bags (large)
- 2 Ice Bags (throat)

Exhibit "A"—(Continued.)

ROOM No. 4—(Cont'd)		ROOM No. 7	
2 Pillows	[34]	1 Chair	
1 Full Length Rubber Sheet		1 Bed—Twin size & bedding	
1 Half Size Rubber Sheet		(brown)	
18 Gowns for Patients		1 Chest of Drawers	
2 Emergency Kits		2 Scatter Rugs	
3 Operating Rubber Gowns		2 Pair Curtains	
1 Tonsil & Throat Cleansing		1 Table Lamp and Shade	
Equipment		ROOM No. 8	
ROOM No. 5		1 Stand Lamp & Shade	
1 Ice Refrigerator		1 Bed—Twin Size & Bedding	
1 Gas Range		1 Chest of Drawers	
1 Dining Table		2 Stand Tables	
6 Dining Chairs		3 Scatter Rugs	
1 Ironing Board		3 Plaid Curtains	
6 Plates—Dinner		INCIDENTALS	
6 Plates—Salad		5 Guns	
6 Cups & Saucers		1 set Boxing Gloves	
1 Large Salad Bowl		1 set Athletic Equipment	
4 Bowls—Asst. Sizes		2 Trunks	
6 Glass Tumblers		4 Suitcases	
1 Set Silverware		1 Bronze Bust of Napoleon	
2 Compartment Plates		1 Dorlands Medical Dictionary	
2 Pitchers—Water		2 Desk Blotters Holders—	
2 Pitchers—Cream		Brown & Tooled Leather	
3 Fruit Juice Reamers		1 Desk Library	
2 Sets Salt & Pepper		1 Fountain Pen Holder	
4 Vegetable Dishes		1 Calendar—Leather	
2 Oven Baking Dishes		1 Baumanometer	
6 Kitchen Towels—Hand		9 Scatter Rugs	
9 Dish Towels		18 Sheets	
1 Set Cutlery (Kitchen)		12 Pillow Cases	
Kitchen Utensils		2 Bath Mats—Coral & Black	
Set of 9 Cooking Utensils		4 Pair Curtains	
3 Pair Curtains		2 Pair Drapes	
1 Coffee Pot—Drip		1 Set of 22 Leather Bound	
1 Tea Pot		Books	
ROOM No. 6		1 Set of 10 Prof. Books	
1 Waste Paper Basket		93 Books on Foot Correction	
1 Dresser—Green		36 Bound Manual & Books	
1 Bed "Full Size Double"		9 Professional Note Books	
with Spring & Mattress		Fiber Bound	
and Bedding—Green		1 Seal Stamp	
1 Table Stand—Green		1 Set Letterhead Cuts	
3 Scatter Rugs		1 Set Diploma Cuts	
2 Chairs		1 Class Manual—Leather	
4 Pair Curtains		Bound	
		18 Note Books	
		3 Files and Contents	
		1 Set cuts and Pictures for	

Exhibit "A"—(Continued.)

INCIDENTALS—(Cont'd)	8 Books of Ledgers and Case
Cuts for Noland System	Records (Photographs)
of Foot Correction	personal & family

PERSONAL

One (1)—96/100 Caret Diamond Tie Pin

One (1)—12 Cylinder Cadillac Convertible Coupe Automobile
—1931 Model

Said Cadillac Automobile is described as follows:

License Number	—5 R-9979
Make and Cyls.	—Cad. 12
First Sold	—9-15-31
Date issued	—2-5-35
Serial Number, Same	
Engine Number	—1004797
Type	—Convertible Coupe

One (1)—Safety Deposit Vault Box at Security First National Bank of Los Angeles, Branch No. 142, located at Wilshire Boulevard near La Brea Avenue, Los Angeles, California; Box Key No. 2057 to said Deposit Box; Subject to rental agreement with said Bank. Five Dollars (\$5.00) lawful United States Money. [37]

Property of all kinds, real and personal, may be leased, chartered, subleased, rented, operated, purchased, owned, bought, sold, mortgaged hypothe- cated; borrow and loan money; prosecute and de- fend law suits, all of which may be performed and executed by the Trustees.

Trustees may enter into and conduct any and all kinds of business and may do all things necessary to be done in any business they may enter into and that will be beneficial to the estate herein, and property herein conveyed and delivered is hereby accepted to constitute this initial benevolent trust estate as herein provided.

The Trustees may be three (3) in number or less, and shall hold office by appointment or ma-

Exhibit "A"—(Continued.)

jority vote of the Trustees, and other trustees may be added as herein provided, to fill vacancies.

Trustees shall hold office as herein provided, except for death, resignation, malfeasance in office or obvious tort.

Trustees shall hold title to all property in trust as herein provided. Filing and recording this instrument in the County Recorder's Office, in the City of Phoenix, County of Maricopa, State of Arizona, U. S. A., shall be notice to the entire world that all obligations and debts of this estate must look to the assets and funds of this estate for payment of all obligations and debts, and the trustees, members, beneficiaries or representatives connected in any manner with this estate, shall not be held personally for obligations and debts of this estate beyond the assets and funds of this estate, and said obligations and debts of this estate shall not jeopardize their personal holdings or any estate they may administer or assist to administer, and the Trustees shall give due notice to this effect upon all documents pertaining to any business that is done for or with this estate in all important transactions. [38]

The Trustees may do any and all things that will be benevolent to poor children, women and men, or organizations who are worthy of benevolent assistance from this estate in the discretion and judgment of the Trustees.

The Trustees may receive donations, gifts and other things of all kinds, by will or otherwise, and

Exhibit "A"—(Continued.)

may make donations and gifts for benevolent purposes in the discretion and judgment of the Trustees.

The duration of this benevolent Trust estate shall be for twenty-one (21) years after the death of the last surviving subscribing Trustee hereto, and in each and every twenty-one (21) year period from the date hereof, this contract and agreement shall automatically renew itself, consecutively, twenty-one (21) years after the death of the last surviving subscribing trustee in each and every twenty-one (21) year period from the date hereof, during the life and existence of the Constitution of the United States.

The Trustees shall use the suffix "Ltd." in conjunction with their business name to qualify the limited liability of the Trustees and others as provided herein.

The Trustees may extend or amend the terms and conditions of this contract and agreement by recording all extensions or amendments at all places wherein this contract and agreement have been formerly recorded, and may perform and execute a dissolution at any time, by recording said dissolution, at all places wherein this contract and agreement have been formerly recorded, providing that all things done herein are for a good and sufficient reason for the benefit of the estate as herein provided.

Regular or special meetings may be provided for by the Trustees, and all special meetings must be

Exhibit "A"—(Continued.)

called by giving ten (10) days written notice to each Trustee, by mailing to the last known address of each Trustee of record in the records of the Trustees, and the signatures of all the Trustees to the minutes of any meeting shall be a final validation of the acts of the Trustees at each meeting.

The Trustees may choose and select a bank as the depository for the funds of this estate in lieu of a treasurer.

The Trustees when in doubt as to the validity of any contemplated act may, through their counsel who is admitted to practice in the United States Court, apply to the Honorable United States District Court for instructions as to the validity of such act, and said instructions shall govern the Trustees.

Fiscal reports may be made annually by the Trustees on a date to be mutually agreed upon by the Trustees.

The Trustees are hereby restrained and enjoined from any actual or pretended "issue and/or sale" of capital stock, such being a corporation prerogative, nor shall the Trustees "issue and/or sell" shares of undivided interests in the estate properties, such being a co-partnership act, either of which would be prejudicial of the purity of estate trust in this creation and establishment of this Benevolent Trust Estate, and in contravention of the fundamental of the trust estate principles and policies herein employed, set forth and provided.

Exhibit "A"—(Continued.)

The purport of the creation and establishment of this Benevolent Trust Estate, through this instrument and the jurisdiction thereof, as set forth and provided herein, is to establish evidence of this organization, to evidence the conveyance and assignment, and acceptance of property as described herein, equities, properties, funds, and all things of value to the Trustees to constitute the trust in this estate of the Trustees, and a distinct holding of this Benevolent Trust Estate, title to be held, in all properties of this estate, in Joint Tenancy Holding by the Trustees, perpetuated beyond interruption by death of any Trustees [40] or Trustee, or persons, as provided herein, and to provide for sale and conservative and economical management and administration of this pure Benevolent Trust Estate by natural persons who are qualified by human attributes, and Citizen Trustee Rights.

The Trustees may, at any time in their discretion and judgment, pay any and all expenses incurred and accrued in the operation and administration of this estate, from any available resource or funds of this estate, as provided herein, during the life and existence of this Benevolent Trust Estate.

All persons, organizations and institutions, of all kinds, individually or collectively, who are eligible or qualified to become members or committees of this organization of members, subject to the rules

Exhibit "A"—(Continued.)

and regulations of the Trustee as set forth and provided in the records of the Trustees, and as such may become members or committees of this organization of members, and all members shall subscribe to the terms and conditions as set forth and provided herein, and all members agree to support morally and otherwise the principles and policies of this organization, as set forth and provided herein, for the purpose of advancing the welfare and progress of this organization on the interests of this estate, its Trustees, its Members, also advancing in a scientific manner for the benefit of humanity.

All committees shall be selected and appointed by the Trustees from among the members, and the Trustees may appoint a chairman or chairmen of each committee or committees appointed by the Trustees.

All members and Trustees' names and addresses shall be written in full in the Trustees' records, which record shall be kept especially for this purpose, and known as the "Register of Members" which shall be kept in the custody of the Trustees, and the Trustees' records shall be subject to the provisions of the Constitution, Federal Law and Immunities of the United States of America. [41]

The Trustees may appoint or elect committees for any and all purposes deemed advisable in the discretion and judgment of the Trustees. An advisory committee may be established or any other

Exhibit "A"—(Continued.)

committees, for anyone or numerous purposes, may be established when deemed advisable by the Trustees.

The Trustees may, in their discretion and judgment, call all members, trustees, committees or beneficiaries to meet at any time when deemed advisable, annually or otherwise, to hear and discuss reports, or any other matters that may arise, such as organization improvement and betterment, or anything else that may be considered as important to be brought before the members and committees of this organization, and while the members, committees or beneficiaries at any meeting or meetings may adopt resolutions of approbation or protest, no act or resolution of the members, committees or beneficiaries, shall be construed as mandatory over the Trustees, nor in any manner to embarrass or question the rights of the Trustees to exclusively manage, control, administer, and hold legal title to the trust estate properties and funds of this estate, for the full term and life of the existence of this Benevolent Trust Estate, as provided herein.

The Trustees shall be elected and appointed by a vote or appointment of the Trustees as herein provided only, as a violation of this act would subject this organization to many liabilities and impositions which do not apply to this pure Benevolent Trust Estate, as set forth and provided herein, and as provided in and by the Constitution, Federal

Exhibit "A"—(Continued.)

Laws and Immunities of the United States of America.

In the event of death of a Trustee the remaining Trustee or Trustees may elect or appoint a Trustee or Trustees, and if the Board of Trustees should become entirely vacant from any natural cause, or through an Act of God, last wills and testaments [42] of the natural Trustees and joint tenancy of the life of this trust estate contract and agreement may name the successors to act for the benefit of this trust estate as provided herein.

The President of the Board of Trustees shall be William D. Noland and the Secretary of the Board of Trustees shall be Peggy A. Archer and such is unanimously voted and resolved by the Trustees.

Schedules held by the Trustees and inventories they may make from time to time will more specifically describe the joint tenancy holding of this trust estate.

Trustees may act informally over their signatures collectively, or in their designated business name as herein provided and as exemplified and set forth in this instrument, in the manner herewith as an example in the closing of this contract and agreement.

We Hereby Subscribe Ourselves, the day and date herein written, in confirmation and acceptance of the property herein described and the terms and

Exhibit "A"—(Continued.)

conditions of this contract and agreement as set forth and provided herein.

/s/ WILLIAM D. NOLAND,
Conveyor.

Trustees:

(Seal)

WILLIAM D. NOLAND,
Signature of William D. Noland, Trustee.

PEGGY A. ARCHER,
Signature of Peggy A. Archer, Trustee.

AUDNEY E. SPILLMAN,
Signature of Audney E. Spillman, Trustee. [43]

The said Trustees, in their collective capacity as a Board of Trustees, have hereunto subscribed confirmation in their Business Name, by duly authorized officers of their Board and have caused their Business Name and Common Seal to be affixed hereto as provided and set forth in this instrument.

(Seal)

/s/ WILLIAM D. NOLAND,
President.

/s/ PEGGY A. ARCHER,
Secretary of the Board of Trustees.

Exhibit "A"—(Continued.)

ACKNOWLEDGMENT

This Is To Certify, That William D. Noland, Peggy A. Archer, and Audney E. Spillman personally known to me, appeared in person before me, a Notary Public in and for the County of Los Angeles, State of California, and signed the foregoing instrument admitting to me that they signed the said instrument as their voluntary free, sane act and deed for the uses and purposes therein set forth and provided on the 6th day of June, 1935.

(Seal) NORMA IVERSEN,
Notary Public in and for the County of Los
Angeles, State of California.

My commission expires March 29, 1939.

Received copy of the within this 19th day of
April, 1948.

JAMES M. CARTER,
By /s/ VELORUS BONHUS,

Attorney for

[Endorsed]: Filed April 19, 1948.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF SECOND
AMENDED BILL OF COMPLAINT

State of California,
County of Los Angeles—ss.

William D. Noland, Trustee, and William D. Noland, Personal, being first duly sworn, deposes and says:

That the attached papers are true and correct copies of the original papers and are marked "Exhibit E" for identification, in support of Second Amended Bill of Complaint.

/s/ WILLIAM D. NOLAND,
Trustee.

/s/ WILLIAM D. NOLAND,
Personal.

Subscribed and sworn to before me on this 19th day of April, 1948.

/s/ RICHARD M. GOUGH,
Notary Public, in and for the County of Los Angeles, State of California.

My commission expires May 18, 1948. [45]

EXHIBIT "E"

Form 1202

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Seal January 26, 1945

Office of Internal Revenue Agent in Charge,
Los Angeles Division.

LA:30D

Dr. William D. Noland, Trust Estate, Ltd.
William D. Noland, Trustee
3944 Wilshire Blvd., Los Angeles, California.
Dear Dr. Noland:

I enclose a copy of the report of the examination of your income tax returns for the year 1943. After consideration by this office, the following adjustment of your tax liability appears to be warranted, for the reasons stated in the report:

Year	1943
Additional tax	\$1,061.77
Penalty	53.09
Total Additional Tax and Penalty	\$1,114.86

If You Agree to this adjustment, the enclosed form of waiver should be executed and forwarded to this office promptly, in order to permit the early assessment of the additional tax and penalties and to stop the accumulation of interest. Such interest will cease 30 days after the receipt of the executed form, or upon the payment of the additional tax and penalties to the collector, whichever occurs first.

Exhibit "E"—(Continued)

If you desire to make immediate payment of the additional tax and penalties without awaiting assessment, you should forward your remittance to the Collector of Internal Revenue at Los Angeles 12, California, enclosing this letter, or a copy thereof. Interest on the additional tax should be included in your remittance, computed [46] at the rate of 6 per cent per annum for the due date of the first installment to the date of the payment.

If You Do Not Agree to the adjustments in tax and the penalties proposed, you may file a protest, executed in triplicate under oath, with this office, within 30 days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in this office will be granted you prior to final determination of any deficiency, against you. This letter is not a final notice of deficiency, and this office will be pleased to answer any questions which may occur to you in your examination of the enclosed copy of the report.

Should you fail to pay the additional tax and penalties to the collector of internal revenue or to file with this office within the 30-day period mentioned either a waiver on the enclosed form or a written protest, final determination of your tax and penalty liability will be made and a notice of deficiency will be sent you in accordance with the provisions of law applicable to the assessment and collection of income and profits tax deficiencies.

Exhibit "E"—(Continued)

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.

Respectfully,

GEORGE D. MARTIN,
Internal Revenue Agent in Charge.

Enclosures: Report of examination. Form of waiver 870. Form of acknowledgment. [47]

Name: WILLIAM D. NOLAND

Year: 1942

Net income disclosed by return Form 1041 No. 1453688..\$ 287.63

Add: The detail of income and expenses is shown on the next sheet attached. Under Sec. 167 of the Internal Revenue Code where the trustee and trustor and the beneficiary are the same the income is taxable to the

Trustor 3,935.47

\$4,223.10

Net income as adjusted.....\$4,223.10

Less: Personal Exemption\$500.00

Credit for Dependents..... 350.00 850.00

Balance, surtax net income..... \$3,373.10

Less: Interest on Liberty Bonds, etc.

Earned income credit.....\$422.31

\$ 422.31

Balance, subject to normal tax.....\$2,950.79

Normal tax at 6%.....\$177.05

Surtax 479.70

Total Tax \$ 656.75

Less: Income tax paid at source.....

Income tax, foreign country.....

Tax liability as adjusted..... \$ 656.75

Tax previously assessed: Original.....

Subsequent: List

Overassessment allowed

Additional tax Overassessment

Date of report: November 3, 1944.

JOHN H. CRAMER,
Internal Revenue Agent.

[48]

Exhibit "E"—(Continued)

WILLIAM D. NOLAND

Adjustments to business income:

Description	Amounts per return 1041	Adjust- ments	Amended Income & Expenses
Fees received	\$11,233.50		\$11,233.50
Expenses:			
Salary of Nurses & Secretary	2,625.00		2,625.00
Rent	1,800.00	\$600.00*	1,200.00
Support W. D. Noland, Jr.....	300.00	300.00***	-----
Laboratory, etc.	1,715.37	571.79*	1,143.58
Taxes on fixtures	4.17	-----	4.17
Office supplies, etc.	931.56	931.56**	-----
Automobile expense	1,098.25	549.12***	-----
Ice	53.30	-----	53.30
Plumbing and electrician.....	13.76	4.58*	9.18
Laundry and sanitation.....	434.24	144.75*	289.49
Attorney fees for litigation....	265.00	265.00***	-----
Printing	326.63	-----	326.63
Utilities, etc.	265.49	88.49*	177.00
Internal Revenue, etc.....	220.68	220.68**	-----
Dues	26.00	-----	26.00
Gardner, etc.	129.00	129.00**	-----
Water, chemicals, etc.....	606.92	-----	606.92
Charity, etc.	130.50	130.50**	-----
Net income.....	\$ 287.63		\$ 4,223.10

* Items which are adjusted by one-third include expenses of the entire household two-thirds of which is devoted to the profession. Taxpayer is living in the other portion of the house.

** Items restored to income through lack of information as to what constitutes professional and personal expense.

*** Items restores to income to eliminate personal expense.

These items of income and expense were shown on a Fiduciary return Form 1041 filed in error. [49]

William D. Noland

Year 1943

Schedule No. 1

Adjustments to Net Income

Form 1041 No. 188370	Income Tax Net Income	Victory Tax Net Income
Net income as disclosed by return.....	\$ 993.98	\$ 993.98
As corrected	5,317.43	5,317.43
Net adjustment as computed below.....	\$4,323.45	\$4,323.45

Exhibit "E"—(Continued)

Form 1041 No. 188370	Income Tax Net Income	Victory Tax Net Income
Unallowable deductions and additional income:		
(a) adjustments eliminating personal expenses and taxing the net income disclosed to the taxpayer instead of to a trust as shown in detail by Schedule 1 (a).		
These adjustments are made for the same reason as given in Schedule on Page 2.		
Total.....	\$4,323.45	\$4,323.45
Non-taxable income and additional deductions: None.		
Net adjustment as above.....	\$4,323.45	\$4,232.45
William D. Noland		

Adjustments to Business Income
Schedule 1 (a)

Description	Amounts per Form 1041	Adjust- ments	Amended Income & Expenses
Fees received	\$14,263.25		\$14,263.25
Expenses:			
Wages	\$ 2,275.00		2,275.00
Rent	1,800.00	600.00*	1,200.00
Support of W. D. N., Jr.....	300.00	300.00***	
Laboratory, food, etc.....	3,737.19	1,245.73*	2,491.46
Tax on furnishings.....	4.09		4.09
Office Supplies, etc.....	1,080.89	1,080.89	
Automobile expense	1,119.82	559.81*	559.91
Union Ice Company.....	41.23		41.23
Laundry, etc.	473.98	157.99*	315.99
Attorney fees	484.50	484.50***	
Printing	119.70		119.70
Utilities, etc.	334.46	111.48*	222.98
Internal Revenue, Ins., etc....	316.89	316.89***	
Gardner, periodicals, etc.....	150.24	50.08*	100.16
Distilled water, etc.....	801.61	267.20*	534.41
Charity, dues, etc.....	229.67	229.67***	

Totals.....\$13,269.27 4,324.45 9,945.82

* Items starred thus represent expenses of which one-third is restored to income on the grounds they represent personal expense. Taxpayer is using two-thirds of his personal residence for business purposes but is charging the total expense of operating the household to business.

*** Items starred thus are restored to income as in all instances they contain personal expenses that are not disclosed.

Net income.....\$993.98 \$5,317.43

Exhibit "E"—(Continued)

Name of Taxpayer: William D. Noland Schedule No. 2

Year ended December 31, 1943

Computation of Income and Victory Tax—Current

Tax Payment Act of 1943

1. Income Tax net income, from Schedule No. 1.....	\$5,317.43	
2. Less: Personal exemption	\$ 500.00	
Credit for dependents	350.00	850.00
3. Surtax net income.....		4,467.43
4: Less: Certain interest on Gov. obligations earned income credit.....	531.74	531.74
5. Balance subject to normal tax.....		3,935.69
6. Normal tax at 6 percent.....	236.14	
7. Surtax on item 3.....	673.49	
8. Total income tax (item 6 plus item 7) or Total alternative tax. Schedule No.....		909.63
9. Less: Income tax paid at source: Income tax paid to a foreign country or U.S. possession, from Schedule No.....		.....
10. Balance of Income Tax.....		\$ 909.63
11. Victory tax net income.....	\$5,317.43	
12. Less: Specific exemption.....	624.00	
13. Income subject to victory tax.....	4,693.43	
14. Victory tax before credit (5% of line 13)	234.67	
15. Less: Victory tax credit 25% plus 2%....	63.36	
16. Net victory tax.....		171.31
17. Net income tax and victory tax.....		1,080.94
18. Income tax for 1942.....		656.75
19. Amount of item 17 or 18 whichever is larger		1,080.94
20. Forgiveness feature (Not to be used if item 17 or 18 is \$50.00 or less) (a) Amount of item 17 or 18 whichever is smaller	\$ 656.75	
(b) Amount forgiven (\$50. or $\frac{3}{4}$ of (a) whichever is larger)	492.56	
(c) Amount unforgiven		164.19
21. Total income and victory tax liability.....	\$ 1,245.13	
22. Income and victory tax liability dis- closed by return.....		183.36
23. Deficiency in income and victory tax.....		1,061.77
5% Negligent Penalty.....	\$ 53.09	
Total deficiency		\$1,114.86

Form 1302-B. Treasury Department, Internal Revenue Service, April, 1944.

Exhibit "E"—(Continued)

Received copy of the within this 19th day of April, 1948.

JAMES M. CARTER,
By /s/ VELORUS BONHUS
Attorney for.....

[Endorsed]: Filed April 19, 1948. [53]

[Title of District Court and Cause.]

NOTICE OF MOTION

To Defendants: William D. Noland, Trustee; William D. Noland Trust Estate, Ltd., and William D. Noland personally and individually in Propria Persona:

Please take notice that the undersigned will bring the "Motion by Defendant Harry C. Westover for Summary Judgment", the "Motion by Defendants Other Than Harry C. Westover for Summary Judgment" (copies [54] of which motions have been served upon you), the "Objection to Motion by Defendant Harry C. Westover for Summary Judgment" (such objection having been filed by you in these proceedings on December 5, 1947), and "Objection to Motion by Defendants Other Than Harry C. Westover for Summary Judgment" (such objection having been filed by you in these proceedings on December 5, 1947), on for hearing before the Honorable J. F. T. O'Connor, United States

District Judge, in his court room in the United States Post Office and Court House Building, Los Angeles, California, on February 9, 1948, at 10:00 a.m., or as soon thereafter as counsel can be heard.

Dated: January 27, 1948.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL and
GEORGE M. BRYANT,
Assistant United States
Attorneys.

EUGENE HARPOLE and
LOREN P. OAKES,
Special Attorneys,
Bureau of Internal Revenue.

By EUGENE HARPOLE,
Attorneys for Defendants.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Jan. 27, 1948. [55]

[Title of District Court and Cause.]

MOTION BY DEFENDANT HARRY C.
WESTOVER FOR SUMMARY
JUDGMENT

Comes now the above defendant Harry C. Westover, Collector, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division (here-

inafter referred to as the above defendant Collector of Internal Revenue) by and through his counsel James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell and George M. Bryant, Assistant United States Attorneys for said district and Eugene Harpole and Loren P. Oakes, Special Attorneys, Bureau of Internal [57] Revenue, and moves the court for a Summary Judgment in his favor pursuant to Rule 56, Federal Rules of Civil Procedure and/or for a Judgment in his favor dismissing the above entitled action as to him with prejudice upon the following grounds, to wit:

I.

Submitted with this Motion is the "Motion by Defendants other than Harry C. Westover for Summary Judgment". There is hereby incorporated herein by reference ground I of said Motion which is based upon principles of *res judicata*. The above defendant Collector of Internal Revenue was not a party to said case No. 5716-W but on principles of *stare decisis*, this action against said defendant Collector of Internal Revenue cannot lie since such a holding would be inconsistent with and contrary to the judgment of this Court on January 9, 1947, in said case No. 5716-W. By the foregoing Judgment the Internal Revenue Agents who made the instant determinations were held not liable for their actions in that behalf. For reasons set forth in section I of the Memorandum of Points and Au-

thorities supporting this Motion, the above action cannot be maintained against the said Collector of Internal Revenue in view of the foregoing Judgment in case No. 5716-W.

II.

Paragraph 4 in the prayer for relief at the end of the Amended Complaint refers to refunds herein sought. Exhibit I to Amended Complaint shows the filing of two refund claims. One of said claims refers to a payment of \$80.45 on July 6, 1942, and the other refund claim relied upon by Complainants relates to the year 1942 and alleges payments of \$35.64 made on or before March 15, 1943. In other words the instant payments were made on July 6, 1942 and not later than March 15, 1943. None of such payments could in any event have been collected by the above defendant Collector of Internal Revenue since such Collector did not commence his duties as Collector of Internal [58] Revenue for the Sixth Collection District of California until July 1, 1943. As to the date when such Collector assumed his duties see paragraph 21,018, page 21,027, Volume 3 of the 1947 Prentice-Hall Federal Tax Service and Affidavit of said Harry C. Westover, which is attached hereto and hereby incorporated herein by reference.

III to VIII, Inclusive.

For grounds III to VIII, inclusive, in support of this Motion reference is made to grounds III to VIII, inclusive, in the above "Motion by Defendants other than Harry C. Westover for Summary

Judgment''. The grounds last mentioned are hereby incorporated herein by reference.

This Motion is based upon the files, pleadings, exhibits and memoranda in this case, upon the points and authorities filed by the above defendant Collector of Internal Revenue and the other defendants concurrently herewith, upon such other points and authorities as may hereinafter be filed by the above defendant Collector of Internal Revenue and upon oral argument.

Dated: December 1, 1947.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL and
GEORGE M. BRYANT,
Assistant United States
Attorneys.

EUGENE HARPOLE and
LOREN P. OAKES,
Special Attorneys,
Bureau of Internal Revenue.

By /s/ LOREN P. OAKES,

Attorneys for defendant Harry C. Westover, Collector of Internal Revenue for Sixth Collection District of California.

[Endorsed]: Filed Dec. 1, 1947. [59]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION BY
DEFENDANT HARRY C. WESTOVER
FOR SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

Harry C. Westover being first duly sworn, deposes and says:

I am one of the defendants in the above entitled proceeding and am the Collector of Internal Revenue for the Sixth Collection District of California with offices in the Federal Building, Los Angeles, California. I commenced my duties as such Collector on July 1, [60] 1943, and prior to that date I never held the office of nor acted as a Collector of Internal Revenue for the United States of America in the Sixth Collection District of California or elsewhere. Prior to the said date of July 1, 1943, I did not collect or receive any taxes or other funds from the above mentioned Complainants or any of them.

/s/ HARRY C. WESTOVER.

Subscribed and sworn to before me this 1st day of December, 1947.

(Seal) /s/ C. M. COMMINS,

Notary Public in and for said County and State.

[Endorsed]: Filed Dec. 1, 1947. [61]

[Title of District Court and Cause.]

**MOTION BY DEFENDANTS OTHER THAN
HARRY C. WESTOVER FOR SUMMARY
JUDGMENT**

Come now the above defendants, George D. Martin, Internal Revenue Agent in Charge, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division; Norman Hayward, Internal Revenue Agent; Raymond B. Sullivan, Acting Internal Revenue Agent; and John H. Cramer, Internal Revenue Agent (hereinafter referred to as the above four defendants), by and through their counsel, James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell and George M. Bryant, [62] Assistant United States Attorneys for said district and Eugene Harpole and Loren P. Oakes, Special Attorneys, Bureau of Internal Revenue, and move the court for a Summary Judgment in their favor pursuant to Rule 56, Federal Rules of Civil Procedure and/or for a judgment in their favor dismissing the above entitled action as to them with prejudice upon the following grounds, to wit:

I.

This action and the amended Bill of Complaint herein (hereinafter referred to as the Amended Complaint) were filed by the above Complainants who are the same Complainants who brought the

action in this court to which was assigned Docket No. 5716-W. The above four defendants were also named as defendants in said case No. 5716-W as will appear from the records of this court in case No. 5716-W. This court will take judicial notice of its records in said case No. 5716-W and the above four defendants hereby incorporate herein by reference the pleadings and proceedings in said case No. 5716-W, including the Judgments and Orders therein entered.

In the Bill of Complaint, etc. (hereinafter referred to as the Complaint) filed by the above Complainants in case No. 5716-W, they alleged that the above four defendants "made aforesaid fraudulent confiscations, assignments, transfers and deliveries of assets from the aforesaid benevolent trust estate to the personal account of William D. Noland for the purpose of creating additional taxes without the consent and permission of the Complainants hereof" (see paragraph 16 of the said Complaint in case No. 5716-W) and said Complaint made numerous allegations to similar effect. The Amended Complaint in case No. 7315-O'C contains repetitions of these same allegations of fraud made by these same Complainants against the same above four defendants.

The first three paragraphs of the prayer for relief appearing at the end of the Amended Complaint in case No. 7315-O'C show that Complainants are seeking declaratory relief as therein set forth. Par-

agraph 7 of the prayer for relief appearing at the end of the Complaint [63] filed in case No. 5716-W when considered with the parts of the Complaint which precede the same show that likewise in case No. 5716-W the above Complainants sought the same declaratory relief which related to the same tax issues as those set forth in case No. 7315-O'C.

Paragraph 4 of the prayer for relief appearing at the end of the Amended Complaint in case No. 7315-O'C shows that the Complainants seek a refund of certain alleged tax payments. This part of the instant prayer for relief corresponds to paragraph 5 of the prayer for relief appearing at the end of the Complaint in case No. 5716-W. In said paragraph 5 Complainants sought the refund of said amounts, which included the same tax payments which are covered in the instant prayer for relief at the end of case No. 7315-O'C Amended Complaint.

The above Complainants in case No. 7315-O'C do not seek the injunctive relief which they sought in case No. 5716-W. However, all of the relief sought by these Complainants in case No. 7315-O'C is a duplication and repetition of the relief which they sought in case No. 5716-W in connection with issues therein litigated in addition to the issues relating to injunctive relief.

Since all of the issues and relief now sought by the above Complainants in case No. 7315-O'C was litigated in and denied to Complainants in case No.

5716-W, the litigation in the case last mentioned and the judgment of January 9, 1947, in case No. 5716-W results in a situation wherein the above Complainants are precluded from bringing the instant action against the above four defendants on principles of *res judicata*. The above judgment of January 9, 1947, in case No. 5716-W was entitled "Order and Judgment of Dismissal as to Defendants George D. Martin, Norman Hayward, Raymond B. Sullivan, and John H. Cramer, Internal Revenue Agents" and read as follows:

"On November 19, 1946, the said defendants, George D. Martin, Norman Hayward, Raymond B. Sullivan and John H. Cramer, Internal Revenue Agents (hereinafter referred to as the above four defendants), filed a Motion moving the [64] Court to dismiss the above action as to them upon grounds set forth in such Motion including the ground that the Complaint herein fails to state facts sufficient to justify the issuance of an injunction or the granting of any injunctive relief whatsoever herein, and the further ground that such Complaint fails to state a claim upon which relief as prayed for in the Complaint or any other relief can be granted against the above four defendants or any of them.

"The matter of the foregoing Motion by the above four defendants having regularly come on for hearing on December 4, 1946, before the Honorable Jacob Weinberger, Judge presiding therein, and the Complainant William D. Noland appearing in

propria persona on behalf of himself individually, and also as trustee of the above Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, and the above four defendants appearing by James M. Carter, E. H. Mitchell and Loren P. Oakes, counsel for such defendants, and all matters relating to the above Motion having been submitted to the Court for its decision, and the Court having considered the pleadings and other papers herein filed and heard the arguments of the Complainant William D. Noland appearing in the capacities above stated and of counsel for the above four defendants concerning the foregoing matter, and the Court being fully advised in the premises, and by virtue of the law, the matters aforesaid and the grounds hereinafter mentioned, now renders its decision as follows:

“It is hereby ordered, adjudged and decreed:

“1. That the application and prayer in the Complaint and proceedings herein for an injunction or any type of injunctive relief whatsoever is hereby denied on the grounds (A) that the Complaint herein filed does not state [65] a claim upon which relief can be granted by the issuance of any type of injunction or injunctive relief, (B) that it does not appear that any irreparable injury, loss or damage will result from the failure to issue any type of injunction or injunctive relief, and (C) as to the grounds set forth in the Complaint in connection with the prayer for injunction or injunctive relief, the Complainants have plain, speedy and adequate

remedies at law to such an extent that this Court cannot properly grant any type of injunction or injunctive relief as prayed for in the Complaint herein.

“2. That the above action not only with respect to the injunctive relief therein prayed, but also as to all of its other aspects and in its entirety, is hereby dismissed as to the above four defendants on the ground that the Complaint herein filed fails to state a claim upon which relief as prayed for in the Complaint or any other relief can be granted against said four defendants or any of them.

“3. That the said defendants, George D. Martin, Norman Hayward, Raymond B. Sullivan and John H. Cramer, Internal Revenue Agents, shall have judgment for and shall recover from the said Complainant William D. Noland individually and as trustee of the said Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, in the amount of the costs of said defendants, to be taxed by the Clerk of this Court in the sum of \$20.00.

“4. That the Clerk of this Court shall enter this Order and Judgment of Dismissal.

“Dated: This 9th day of January, 1947.

/s/ JACOB WEINBERGER,

United States District Judge.” [66]

II.

Paragraph 4 in the prayer for relief appearing at the end of the Amended Complaint herein seeks

the refund of certain tax payments. Exhibit I to the Amended Complaint discloses that refund claims were filed only as to a payment of \$80.45 relating to income tax for the year 1937 and a further item of \$35.64 relating to income tax for the year 1942. Under Sections 3772 and 322 of the Internal Revenue Code, suits for tax refunds are possible only as to tax payments as to which refund claims have been filed. Since Complainants allege no refund claims other than the above refund claims, this Court can consider only the question of refunding said amounts of \$80.45 and \$35.64, such being the only items covered by refund claims as alleged by Complainants. Exhibits A, B, C and D attached to this Motion show that none of the four defendants collected taxes or other funds from the above mentioned Complainants or any one of them. As to defendant Norman Hayward, it is admitted that this defendant had custody of the above sum of \$80.45 as more fully set forth in the above Exhibit D hereto. Even if this Court should conclude that the said Norman Hayward rather than the Collector of Internal Revenue mentioned in said Exhibit D made the collection of said item of \$80.45, the collection of such item is nevertheless immaterial because the refund thereof is barred by the applicable statute of limitations—see Ground VI in support of this Motion as subsequently set forth herein. Page 1 of plaintiffs' Exhibit I in support of the Amended Complaint herein shows that by Complainants' own admission the above payment of

\$80.45 was made on July 6, 1942, which was more than three years prior to the date of March 15, 1946, on which the instant refund claims were filed, according to Complainants' above Exhibit I. Since the above four defendants did not collect the instant tax payments, it follows that this suit against them for the refund of said payments will not lie and such four defendants are accordingly entitled to Summary Judgment on this issue. [67]

III.

The above prayer for relief appearing at the end of the Amended Complaint herein filed and especially the first three paragraphs of such prayer seeks an adjudication herein with respect to the rights of an alleged benevolent trust estate described as the Dr. William D. Noland Trust Estate, Ltd., of which William D. Noland, H. K. Miller and Harry R. Maxwell are alleged to be the trustees. All of the above trustees and the foregoing trust are indispensable parties plaintiff, but none of the above trustees have appeared herein with the possible exception of William D. Noland, and if he has appeared herein as trustee, such appearance would not be valid or authorized in view of his adverse interest with respect to the above trust as shown by the Amended Complaint herein, and other papers herein filed by Complainants. Since the only plaintiff validly appearing herein is William D. Noland in his individual capacity, there is an absence of indispensable parties plaintiff as to all

of the other plaintiffs or Complainants named in the Complaint herein, and in view of the absence of the above indispensable parties plaintiff, the court lacks jurisdiction of the above entitled action, which relates to the foregoing trust and trustees.

IV.

The prayer for relief appering at the end of the Amended Complaint herein filed (see particularly the first three paragraphs thereof) in effect seeks a declaratory judgment with respect to various liabilities for Federal taxes and the seeking of such relief violates Section 274d. of the Judicial Code (Section 400, Title 28, U.S.C.A.) as more particularly set forth in the memorandum of Points and Authorities supporting this Motion and hereto attached.

V.

The two refund claims herein involved (copies set forth as Exhibit I to the Amended Complaint herein) are inadequate for purposes of the instant suit. (This point is more fully treated in [68] Section V beginning at page 8 of the Memorandum of Points and Authorities supporting this Motion and herewith submitted.)

VI.

The applicable statute of limitation is a bar to recovery as sought by the above tax refund claims.

VII.

The allegations of the Amended Complaint and the Exhibits thereto (particularly Exhibit F to the Amended Complaint) disclose not that the assets of the instant trust were confiscated, assigned, transferred or delivered at all by the Internal Revenue Agents (as alleged in the Amended Complaint) but rather that the Commissioner of Internal Revenue determined that the earnings of the Complainant William D. Noland, from the practice of the profession of a doctor of Chiropractic were his personal earnings and taxable as such to him for Federal income tax purposes, and that certain deductions from said earnings claimed by the plaintiff were not allowable as deductions for income tax purposes under the Internal Revenue laws.

VIII.

The Amended Complaint herein filed fails to state a claim upon which relief as prayed for in said Amended Complaint or any other relief can be granted against the above defendants or any of them. (This point is covered in detail in Section VIII beginning at page 12 of the Memorandum of Points and Authorities supporting this Motion and submitted herewith.)

This Motion is based upon the files, pleadings, exhibits and memoranda in this case and the above related case of No. 5716-W, upon the points and authorities filed by the above four defendants con-

currently herewith, upon such other points and authorities as [69] may hereinafter be filed by said defendants, and upon oral argument.

Dated: December 1, 1947.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL and
GEORGE M. BRYANT,
Assistant United States
Attorneys.

EUGENE HARPOLE and
LOREN P. OAKES,
Special Attorneys,
Bureau of Internal Revenue.

By /s/ LOREN P. OAKES,

Attorneys for defendants George D. Martin, Norman Hayward, Raymond B. Sullivan and John H. Cramer, Internal Revenue Agents.

[Endorsed]: Filed Dec. 1, 1947. [70]

EXHIBIT "A"

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION BY
DEFENDANTS OTHER THAN HARRY C.
WESTOVER FOR SUMMARY
JUDGMENT

State of California,
County of Los Angeles—ss.

George D. Martin being duly sworn, deposes and says:

I am one of the defendants in the above entitled

proceeding and am the Internal Revenue Agent in Charge for the United States Treasury Department, Internal Revenue Service at Los Angeles, California. I have never at any time collected or received any taxes or other funds from [71] the above mentioned complainants or any of them.

/s/ GEORGE D. MARTIN.

Subscribed and sworn to before me this 1st day of December, 1947.

(Seal) /s/ G. L. LYNCH

Notary Public in and for said County and State.

My commission expires August 23, 1949.

[Endorsed]: Filed Dec. 1, 1947. [72]

EXHIBIT "B"

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION BY
DEFENDANTS OTHER THAN HARRY C.
WESTOVER FOR SUMMARY
JUDGMENT

State of California,
County of Los Angeles—ss.

Raymond B. Sullivan being first duly sworn, deposes and says:

I am one of the defendants in the above entitled proceeding and am an Internal Revenue Agent in the office of the Internal Revenue Agent in Charge

for the Treasury Department, Internal Revenue Service at Los Angeles, California. I have never at any time collected or [73] received any taxes or other funds from the above mentioned complainants or any of them.

/s/ RAYMOND B. SULLIVAN.

Subscribed and sworn to before me this 1st day of December, 1947.

(Seal) /s/ JUNE EDDY,
Notary Public in and for said County and State.

My commission expires March 1, 1949.

[Endorsed]: Filed Dec. 1, 1947. [74]

EXHIBIT "C"

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION BY
DEFENDANTS OTHER THAN HARRY
C. WESTOVER FOR SUMMARY
JUDGMENT

State of California,
County of Los Angeles—ss.

John H. Cramer being first duly sworn, deposes and says:

I am one of the defendants in the above entitled proceeding and am an Internal Revenue Agent in the office of the Internal Revenue Agent in Charge for the Treasury Department, Internal Revenue Service at Los Angeles, California. I have never at

any time collected or [75] received any taxes or other funds from the above mentioned complainants or any of them.

/s/ JOHN H. CRAMER.

Subscribed and sworn to before me this 28th day of November, 1947.

(Seal) /s/ JUNE EDDY,

Notary Public in and for said County and State.

My commission expires March 1, 1949.

[Endorsed]: Filed Dec. 1, 1947. [76]

EXHIBIT "D"

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION BY
DEFENDANTS OTHER THAN HARRY
C. WESTOVER FOR SUMMARY
JUDGMENT

State of California,

County of Los Angeles—ss.

Norman Hayward being first duly sworn, deposes and says:

I am an Internal Revenue Agent in the office of the Internal Revenue Agent in Charge for the United States Treasury Department, Internal Revenue Service, at Los Angeles, California. The complainant, William D. Noland, agreed that his income tax for the year 1937 amounted to a total [77] of \$80.45 including interest. As an Internal Revenue Agent, it is not within the scope of my duties

to accept payments of taxes on behalf of the Collector of Internal Revenue, who is the officer authorized to receive tax collections. As an accommodation to the said William D. Noland, I undertook to take the sum of \$80.45 from him and deliver the same to the Collector of Internal Revenue in July, 1942. I was acting in behalf of the said William D. Noland when I delivered the foregoing sum to the then Collector of Internal Revenue at Los Angeles, California, on July 7, 1942. I also acted in behalf of the said William D. Noland in procuring for him the receipt for him from the above Collector of Internal Revenue. In conformity with this understanding I wrote the said William D. Noland the following letter on July 24, 1942, and then transmitted to him the receipt therein mentioned:

“July 24, 1942.

“Dr. William D. Noland,
3944 Wilshire Boulevard,
Los Angeles, California.

“Dear sir:

“I am back from vacation, and am to-day completing and turning in the report prepared, also the returns signed for the years 1938 and 1941, now in order. The return for 1937 with cash to pay the tax liability and interest was turned in by me on July 7, 1942. The amount was tax of \$63.85, plus interest of \$16.60, a total of \$80.45.

“I enclose the Collector's receipt for this sum, which has served its purpose in my case, and to which you are of course entitled.

“The case now goes to review, and the next contact in the ordinary course of events will be from the office of the Collector.

“Yours truly,

/s/ N. Hayward,

“Internal Revenue Agent.”

The above sum of money represents the only funds from the said William D. Noland which have come into my custody in the form of tax payments or otherwise. The party collecting the foregoing sum was the [78] then Collector of Internal Revenue and I have not collected taxes or other funds at any time from the above complainants or any of them.

/s/ NORMAN HAYWARD.

Subscribed and sworn to before me this 1st day of December, 1947.

(Seal) /s/ JUNE EDDY,

Notary Public in and for said County and State.

My commission expires March 1, 1949.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed Dec. 1, 1947. [79]

[Title of District Court and Cause]

OBJECTION TO MOTION BY DEFENDANTS
OTHER THAN HARRY C. WESTOVER
FOR SUMMARY JUDGMENT

Comes now William D. Noland, Trustee, afore-said benevolent trust estate, and William D. Noland

personally, complainants herein, and objects to motion by defendants, George D. Martin, Internal Revenue Agent in Charge, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division; Norman Hayward, Internal Revenue Agent; Raymond B. Sullivan, Acting Internal Revenue Agent; and John H. Cramer, Internal Revenue Agent; for summary judgment, upon the grounds set forth in bill of complaint and memorandum of points and authorities filed in the files of this action, which are in support of this objection.

Wherefore, Complainants pray that the said motion be denied and dismissed.

Dated: December 5, 1947.

/s/ WILLIAM D. NOLAND,

Trustee, Dr. William D. Noland Trust Estate, Ltd.,
A Benevolent Trust Estate. In Propria Persona.

/s/ WILLIAM D. NOLAND,

Personal. In Propria Persona.

Received copy of the within objections this 5th day of December, 1947.

/s/ JAMES M. CARTER,

U. S. Attorney.

/s/ GEORGE L. BRYANT,

Attorney for Defendants.

[Endorsed]: Filed Dec. 5, 1947. [82]

[Title of District Court and Cause]

OBJECTION TO MOTION BY DEFENDANT
HARRY C. WESTOVER FOR SUMMARY
JUDGMENT

Comes now William D. Noland, Trustee, aforesaid Benevolent trust estate, and William D. Noland personally, complainants herein, and objects to motion by defendant, Harry C. Westover, for summary judgment, upon the grounds set forth in bill of complaint and memorandum of points and authorities filed in the files of this action, which are in support of this objection.

Wherefore, complainants pray that the said motion [83] be denied and dismissed.

Dated: December 5, 1947.

/s/ WILLIAM D. NOLAND,
Trustee, Dr. William D. Noland Trust Estate, Ltd.
A Benevolent Trust Estate. In Propria Persona.

/s/ WILLIAM D. NOLAND,
Personal. In Propria Persona.

[Endorsed]: Filed Dec. 5, 1947. [84]

In the District Court of the United States,
Southern District of California,
Central Division.

No. 7315—O'C

WILLIAM D. NOLAND, H. K. MILLER and
HARRY R. MAXWELL, Trustees; DR. WIL-
LIAM D. NOLAND TRUST ESTATE, LTD.,
a Benevolent Trust Estate, and WILLIAM D.
NOLAND.

Complainants.

vs.

HARRY C. WESTOVER, Collector, United States
Treasury Department, Internal Revenue Serv-
ice, Sixth Collection District of California, Los
Angeles Division; GEORGE D. MARTIN, In-
ternal Revenue Agent in Charge, United States
Treasury Department, Internal Revenue Serv-
ice, Sixth Collection District of California, Los
Angeles Division; NORMAN HAYWARD, In-
ternal Revenue Agent; RAYMOND B. SULLI-
VAN, Acting Internal Revenue Agent; and
JOHN H. CRAMER, Internal Revenue Agent,
Defendants.

SUMMARY JUDGMENT IN FAVOR OF
DEFENDANT HARRY C. WESTOVER

The defendant, Harry C. Westover, Collector,
United States Treasury Department, Internal Rev-
enue Service, Sixth Collection District of Califor-
nia, Los Angeles Division, having on the first day

of December, 1947, filed a Motion in the above entitled action for Summary Judgment and said Motion coming on regularly to be heard before the Court at Los Angeles, California, on March 30, 1948, the Honorable Charles C. Cavanah, Judge presiding, and the said defendant appearing by James M. Carter, United States Attorney for the Southern District of California, [85] E. H. Mitchell and George M. Bryant, Assistant United States Attorneys for said district, and Eugene Harpole and Loren P. Oakes, Special Attorneys, Bureau of Internal Revenue, and the plaintiffs-complainants William D. Noland as Trustee of the Dr. William D. Noland Trust Estate, Ltd., and William D. Noland, personal, appeared by William D. Noland, memoranda of Points and Authorities in support of the positions of the respective parties had theretofore been filed and the Court at said time heard the argument of counsel, and the Court having considered the said memoranda, arguments of counsel, together with the files, pleadings, exhibits and other memoranda in the above entitled case as well as those of the related case numbered 5716-W therefrom concluded and decided that the Motion of said defendant should be granted.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the defendant, Harry C. Westover, Collector, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division, be and he hereby is given Summary judgment

against the plaintiffs-complainants, William D. Noland as Trustee of the Dr. William D. Noland Trust Estate, Ltd., and William D. Noland, personal, for dismissal of the above entitled action and the costs of said defendant to be taxed by the Clerk of this Court in the sum of \$.

Dated: April 21st, 1948.

/s/ CHARLES C. CAVANAH,
District Judge.

Judgment entered April 21, 1948. Docketed April 21, 1948. Book C.O.50, Page 255. Edmund L. Smith, Clerk.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed April 21, 1948. [86]

[Title of District Court and Cause]

SUMMARY JUDGMENT IN FAVOR OF
DEFENDANTS GEORGE D. MARTIN,
NORMAN HAYWARD, RAYMOND
B. SULLIVAN AND JOHN H.
CRAMER

The defendants, George D. Martin, Internal Revenue Agent in Charge, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division; Norman Hayward, Internal Revenue Agent; Raymond B. Sullivan, Acting Internal Revenue Agent; and John H. Cramer, Internal Revenue Agent, hav-

ing on the first day of December, 1947, filed a Motion in the above entitled action for Summary Judgment and said Motion coming on regularly to be heard before the Court at Los Angeles, California, on March 30, 1948, [88] the Honorable Charles C. Cavanah, Judge presiding, and the said defendants appearing by James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell and George M. Bryant, Assistant United States Attorneys for said district, and Eugene Harpole and Loren P. Oakes, Special Attorneys, Bureau of Internal Revenue, and the plaintiffs-complainants William D. Noland as Trustee of the Dr. William D. Noland Trust Estate, Ltd., and William D. Noland, personal, appeared by William D. Noland, memoranda of Points and Authorities in support of the positions of the respective parties had theretofore been filed and the Court at said time heard the argument of counsel, and the Court having considered the said memoranda, arguments of counsel, together with the files, pleadings, exhibits and other memoranda in the above entitled cases as well as those of the related case numbered 5716-W therefrom concluded and decided that the Motion of said defendants should be granted.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the defendants, **George D. Martin**, Internal Revenue Agent in Charge, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los

Angeles Division; Norman Hayward, Internal Revenue Agent; Raymond B. Sullivan, Acting Internal Revenue Agent; and John H. Cramer, Internal Revenue Agent, be and they hereby are given Summary Judgment against the plaintiffs-complainants, William D. Noland as Trustee of the Dr. William D. Noland Trust Estate, Ltd., and William D. Noland, personal, for dismissal of the above entitled action and the costs of said defendants to be taxed by the Clerk of this Court in the sum of \$.....

Dated: April 21st, 1948.

/s/ CHARLES C. CAVANAH,
District Judge.

Judgment entered April 21, 1948. Docketed April 21, 1948. Book C.O.50, Page 257. Edmund L. Smith, Clerk.

(Affidavit of Service by Mail Attached.)

[Endoresd]: Filed April 21, 1948. [89]

[Title of District Court and Cause]

MOTION TO AMEND COMPLAINT

Comes now William D. Noland, Trustee, and William D. Noland, personal, complainants for his personal interest as a trustee, and personal individual interest, as both interests are involved, and Moves the Court, to amend the complaint in the

above entitled action in above entitled court, upon grounds as follows:

The matter cannot be prosecuted to the fullest extent of the law on account of mistakes and errors which have been made by complainants as a layman and complainants are not lawyers or attorneys, therefore, the complaint needs corrections of said mistakes to be brought to a conclusion in the procedure of same.

Wherefore, complainants pray that complainants be allowed and beg leave of the court to amend the complaint in above action.

Dated: March 3, 1948, Los Angeles, Calif.

/s/ WILLIAM D. NOLAND,
Trustee.

/s/ WILLIAM D. NOLAND,
Personal.

[Endorsed]: Filed March 3, 1948. [91]

At a stated term, to-wit: The February Term. A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 30th day of March in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Charles C. Cavanah, District Judge.

[Title of Cause.]

For hearing (1) motion by defendant, Harry C. Westover, for Summary Judgment, filed Dec. 1, 1947; (2) objections of plaintiffs to said motion of defendant, filed Dec. 5, 1947; (3) motion of defendants other than Harry C. Westover, for summary judgment, filed Dec. 1, 1947; (4) objections of plaintiffs to said motion of defendants, filed Dec. 5, 1947; and (5) motion of plaintiffs to amend complaint, filed March 3, 1948; Wm. D. Noland, present in propria persona and as trustee; Geo. M. Bryant, Esq., Ass't U. S. Att'y, and Loran P. Oakes, Special Att'y, Bureau of Internal Revenue, appearing as counsel for defendants; and both sides answering ready, Court orders that counsel proceed.

Attorney Oakes makes a statement to the Court and refers to action previously heard by Judge Weinberger in this court, being No. 5716-W Civil and contends that the ruling of the Court in that case is *res adjudicata* as to the defendant revenue agents in this case, and *stare decises* as to the defendant Collector; and argues in support of the motion for summary judgment as to Def't Westover and argues in support of motion for Summary Judgment on behalf of defendants other than Def't Westover, and states the grounds of the respective motions, and also state objections to the plaintiff, Wm. D. Noland, appearing for plaintiffs other than himself as he is not an attorney at law. Attorney Oakes makes a further statement of objections to the complaint, and argues further in support of

defendants' said motions; and states defendants' objections to the [92] amendment of the complaint and asks if the motion to amend the complaint is granted, that the motions of defendants for summary judgment stand as to the complaint as amended.

At 10:51 A. M. Plaintiff Noland makes a statement of the objections to the said motions of defendants for summary judgment, and states that he appears only for himself and as trustee; and argues further to the Court in opposition to the said motions of defendants and argues further in support of the motion to amend complaint. The Court makes a statement.

At 11:43 A. M. Attorney Oakes argues further to the Court on behalf of defendants.

The Court makes a statement and there appearing to be no objections at this time to the plaintiff's proposed amendments to complaint, therefore, the amendments are allowed in the manner pursuant to the proposals of the plaintiff served and filed March 19, 1948.

The Court further orders that the said motions for summary judgment as filed shall apply to the complaint as amended by the said proposals of plaintiff.

At 11:52 A. M. court recesses to 2 P. M. today. At 2:03 P. M. court reconvenes herein and Plaintiff Noland being present, defendants' counsel being absent, the Court orders that the case proceed.

Plaintiff Noland makes a further statement to the Court and refers to Ex. "C" and the letter therein, dated 12/14/1944, filed 10/10/47 in support of amended complaint. At 2:05 P.M. Attorney Oakes is now present as counsel for defendants. Plaintiff Noland continues and reads said letter dated 12/14/44 to the Court; and refers to Ex. "F" filed 10/10/47, and the letter therein dated 12/29/45 and reads said letter to the Court; and refers to Ex. "E" and letter therein dated 1/26/45 and reads said letter to the Court.

At 2:15 P. M. Attorney Oakes makes a further statement to the Court on behalf of the defendants and refers to the Judgment in Case No. 5716-W Civil in this Court and reads a portion thereof to the Court and argues further in support of motions of defendants for summary judgment herein.

The Court makes a statement and orders said motions for Summary Judgment by defendants stand submitted pending further order of the Court. [93]

District Court of the United States, Southern
District of California, Central Division

DOCKET ENTRIES

3/19/48—Fld plfs proposals to amend bill of complt.

3/29/48—Fld Order Transf. case to calendar of Judge Cavanah for hrg. of Motions for Summary Judgment, and Motion of plfs. to amend Complaint only; same now being set for hrg. 3/30/48 10 AM Before Judge Cavanah.

- 3/29/48—Ent ord transferring case to Judge Cavanah for hearing on March 30th, 1948 on motion for summary judgment and to amend complaint, etc.
- 3/30/48—Ent proc. hrg. and ent ord permitting plfs. to proposals filed by plf. 3/19/48; and ent ord that Motions of defts. for Summary Judgment shall apply to the compl. as amended by said proposals of plf. Ent proc hrg. Motions of defts. for Summary Judgm. and ord stand submitted pending further ord. of court. (Judge Cavanah).
- 4/19/48—Ent proc. oral decision and ent ord sustain. Motions of defts. for Summary Judgm. Counsel for defts. to prepare and present to the court form of Decree by 4/22/48 (Judge Cavanah).
- 4/19/48—Fld second amended complt. Fld memo pts auths suppt second amd complt. Fld seven affids in suppt of amended complt.
- 4/20/48—Lodged deft's prop sum judgt in favor deft Harry C. Westover; Lodged deft's prop sum judgt in favor cert defts.
- 4/21/48—Ent ord & Fld & Ent CO BK 50/255 Summary Judgment in favor of deft. Harry C. Westover—Dock same. Ent ord & Fld & Ent CO BK 50/257 Summary Judgment in favor defts. George D. Martin, et al Dock same—Mld notice to plf.

Noland and to deft's counsel. MD Report
JS-6.

5/ 4/48—Fld plfs notice of appeal, mld copy to
George M. Bryant, 600 Federal Bldg. Los
Angeles, 12, atty for defts. Fld plfs cost
bond on appeal. [94]

United States of America,
Southern District of California—ss.

I, Edmund L. Smith, Clerk of the United States
District Court for the Southern District of Cali-
fornia, do hereby certify that the foregoing is a full,
true, and correct copy of the docket entries in the
matter of William D. Noland, et al., vs. Harry C.
Westover, et al., No. 7315-O'C, docket entries dtd
3/19/48 to 5/4/48, incl., as the same appears from
the original record remaining in my office.

Witness my hand and seal of said Court, this 7th
day of May, A.D. 1948.

(Seal) EDMUND L. SMITH,
Clerk.

By /s/ EDWARD L. DREW,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Counsel for Defendants and the Defendants
in the Above Entitled Action:

Please Take Notice, that the complainants, Wil-
liam D. Noland, Trustee, and William D. Noland,

Personal, in the above action, is appealing from the **Summary Judgments** made and entered on or about April 21, 1948, in above entitled court and case, to the United States Circuit Court of Appeals for the **Ninth Circuit**, at Los Angeles, California.

Dated Los Angeles, California, April 26, 1948.

/s/ WILLIAM D. NOLAND,
Trustee, In Propria Persona.

/s/ WILLIAM D. NOLAND,
Personal, In Propia Persona.

[Endorsed]: Filed May 4, 1948. [96]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That we, William D. Noland, Trustee, Dr. William D. Noland Trust Estate, Ltd., a Benevolent Trust Estate, and William D. Noland, Personal, complainants in the above entitled court and action, as principals, and H. F. Dexter, Harry R. Maxwell, as Sureties, are held and firmly bound unto the above named defendants, Harry C. Westover, George D. Martin, Norman Hayward, Raymond S. Sullivan and John H. Cramer, in the full sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to be paid to the said defendants, or their counsel, executors, administrators, or assigns; to which payment well and [97] truly to be made, we bind our-

selves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of April, in the year of our Lord One Thousand Nine Hundred and Forty-Eight (A.D. 1948).

Whereas, lately, on or about April 21, 1948, at the District Court of the United States for the Southern District of California, Central Division, in a suit depending in said Court, between the aforesaid complainants and defendants, and whereas Summary Judgments was rendered against the said complainants, William D. Noland, Trustee, and William D. Noland, Personal, and the said complainants have taken an appeal from said summary judgments to the United States Circuit Court of Appeals, for the Ninth Circuit, at Los Angeles, California, to reverse the said summary judgments in the aforesaid suit, and a notice of said appeal to said Court of Appeals directed to the aforesaid defendants having been filed and served, advising said defendants of said appeal to the said Court of Appeals, to be held in Los Angeles, at the term of said Court or as soon thereafter as the Court may attend to this matter and counsel may be heard on said appeal.

Now, the conditions of the above obligation is such, that if the aforesaid complainants, William D. Noland, Trustee, and William D. Noland, Personal, shall prosecute the said appeal to effect, and answer all damages and costs, if said complainants fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

We, the undersigned mutually affix our signatures in confirmation of the terms and conditions herein on the day and date first above written.

(Seal) /s/ WILLIAM D. NOLAND,
Trustee, and Principal.

(Seal) /s/ WILLIAM D. NOLAND,
Personal, and Principal. [98]

Address of Principals: William D. Noland, Trustee, and William D. Noland, Personal, 2030 Wilshire Blvd., Suite 201-205, Los Angeles 5, California.

/s/ H. F. DEXTER,
Surety.

/s/ HARRY R. MAXWELL,
Surety.

United States of America,
Southern District of California,
County of Los Angeles—ss.

H. F. Dexter and Harry R. Maxwell, being duly sworn, each for himself deposes and says, that he is a freeholder in said District, and is worth the sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

/s/ H. F. DEXTER,
Surety.

1329 Myra Ave., Los Angeles 27.

/s/ HARRY R. MAXWELL,
Surety,

14542 Otsego St., Sherman Oak, Cal.

Subscribed and sworn to before me this 3rd day of May, 1948.

(Seal) /s/ BEULAH E. DONATH,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Nov. 16, 1950.

[Endorsed]: Filed May 4, 1948. [99]

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF RECORD
ON APPEAL

To the Clerk of Said Court:

Sir:

Please issue the following documents in above entitled court and case under and pursuant to the Rule of said Court, for use on appeal of the above entitled cause and action to the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

1. Notice of Appeal;
2. Bond for Costs upon Appeal;
3. Assignment of Errors;
4. Second Amended Bill of Complaint;
5. Affidavit of Complainants, William D. Noland, Trustee, and William D. Noland, Personal, with Exhibit A attached; in support of complaint;
6. Affidavit of William D. Noland, Trustee, and William D. Noland, Personal, complainants, with Exhibit E attached, in support of complaint;
7. Notice of Motion for Summary Judgments, by

Counsel for [100] defendant Harry C. Westover, and other defendants;

8. Affidavit in support of motion for summary judgment, by defendant Harry C. Westover;

9. Motion for summary judgment by Harry C. Westover, defendant;

10. Affidavits of George D. Martin, defendant, Raymond B. Sullivan, defendant, John H. Cramer, defendant, and Norman Hayward, defendant, in support of motion for summary judgment for said defendants;

11. Motion for summary judgment by defendants other than Harry C. Westover, defendant;

12. Objection by complainants to motion for summary judgment by defendant Harry C. Westover;

13. Objection by complainants to motion for summary judgment by defendants George D. Martin, Norman Hayward, Raymond B. Sullivan, and John H. Cramer.

14. Summary judgment entered April 21, 1948, in favor of George D. Martin, Norman Hayward, Raymond B. Sullivan and John H. Cramer, defendants;

15. Summary judgment entered April 21, 1948, in favor of Harry C. Westover, defendant;

16. Motion to amend bill of complaint by complainants, filed March 3, 1948;

17. Bill of complaint in case No. 5716-W, U. S. District Court, Southern District of California, Central Division;

18. Judgment made and entered by Judge Weinberger in case No. 5716-W, U. S. District Court, Southern District of California, Central Division;

19. Statement of Points upon Appeal relied upon by Appellants;

20. Minutes of the court for hearing on March 30, 1948, before the Honorable Charles C. Cavanah;

21. Docket of the Court from 3/19/48 to 5/4/48 inclusive;

22. Designation of documents and proceedings upon which appellants rely upon appeal; [101]

23. Court Reporter's Transcript of the proceedings held in above entitled court before the Honorable Charles C. Cavanah, Judge presiding on March 30, 1948;

24. Names and address of attorneys.

Together with any proper additional portions of the record in above entitled case to be designated by such designation as appellees may file herein, pursuant to and under the rules of the above entitled court. The transcript will be put in printed form for final distribution.

Dated Los Angeles, California, May 12, 1943.

/s/ WILLIAM D. NOLAND,
Trustee, In Propria Persona,
Complainant-Appellant.

/s/ WILLIAM D. NOLAND,
Personal, In Propria Persona,
Complainant-Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed May 16, 1946. [102]

[Title of District Court and Cause.]

BILL OF COMPLAINT AND APPLICATION
FOR TEMPORARY RESTRAINING OR-
DER: TEMPORARY INJUNCTION AND
PERMANENT INJUNCTION

Comes now William D. Noland, H. K. Miller and Harry R. Maxwell, Trustees for Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, organized and established by contract under the provisions of the Constitution of the United States of America, the said Trustees acting under citizenship, common law rights of contract, under which said contract the said benevolent trust estate is established, and the said Trustees and William D. Noland complain in this bill of complaint in equity as the complainants against the defendants and each of them for a cause of action, as follows, to-wit:

1.

The contract under which the aforesaid benevolent trust [105] estate is organized was written by the late Franklin P. Bull, commonly known as Judge Bull, who prior to his passing in death, had practiced law in the State of California for over fifty (50) years, and Trustees for said trust estate have an office at 3944 Wilshire Boulevard, Los Angeles 5, California.

2.

The defendants, George D. Martin, Internal Revenue Agent in charge, United States Treasury De-

partment, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division; Norman Hayward and John H. Cramer, Internal Revenue Agents; Joseph D. Nunan, Jr., Commissioner, Internal Revenue Service; Raymond D. Sullivan, Acting Internal Revenue Agent; all located at 417 South Hill Street, Los Angeles, California; and fictitious named defendants, individuals and others 1 to 10, the correct names and addresses of whom are unknown at this time to complainants, and, when correctly known, complainants will respectfully beg leave of the Court to amend this bill of complaint in equity and substitute the correct name and addresses of said fictitious named defendants.

3.

For the jurisdiction of this action in the above entitled Court, federal statutes and federal questions under the jurisdiction of the above Court are involved, and the damages, losses and injuries caused by fraud to complainants, are in excess of Three Thousand (\$3,000.00) Dollars over and above all costs and attorney fees in the prosecution of this action in the above entitled Court.

4.

That on or about July 6, 1942, Norman Hayward, Internal Revenue Agent, and collector for United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, [106] Los Angeles Division, had made several calls

prior to said date and after said date of July 6, 1942, at the office of complainants, at aforesaid address, and the said Norman Hayward defendant herein, upon his first call at the said office of complainants on or about June 6th, 1942, demanded that he be allowed to have the Trustees' books and records of the aforesaid Dr. William D. Noland Trust Estate, Ltd., for the purpose to go over the said books and make a report from said books to the Internal Revenue Service, Treasury Department of the United States, threatening that if he was not allowed to go over said books that he would have warrants issued against William D. Noland, Trustee of the Board of Trustees for said Dr. William D. Noland Trust Estate, Ltd., and the said books and records of the aforesaid trustees and complainants were produced, to the said Norman Hayward, Internal Revenue Agent, and he proceeded to read and check in all detail the said trustees' books and records, and in said reading and checking he spent several days at the aforesaid office of the said trustees and complainants hereof.

5.

That during the several days spent in going over the aforesaid trustees books and records by the aforesaid Norman Hayward, Internal Revenue Agent and Collector, the said Norman Hayward in making up a schedule of taxation to correspond with his views of a schedule for additional taxation for the years of 1937, 1938, 1939, 1940 and 1941, he wilfully and maliciously, with malice aforethought,

through and by fraud, fraudulently confiscated assets and property of the aforesaid benevolent trust estate, Dr. William D. Noland Trust Estate, Ltd., from the said trustees' books and records, and fraudulently assigned, transferred and delivered said assets and property in a schedule to the personal account of William D. Noland, and in this manner of fraud, the said Norman Hayward fraudulently made a personal additional taxation of Four [107] Hundred One and three one-hundredths Dollars (\$401.03) for the said years of 1937, 1938, 1939, 1940 and 1941, after the said trustees had made the tax return reports for said benevolent trust estate of Dr. William D. Noland Trust Estate, Ltd., for the said years of 1937, 1938, 1939, 1940 and 1941. (Copy of said trust estate contract filed herewith under affidavit marked Exhibit "A".)

6.

The said Norman Hayward, Internal Revenue Agent and Collector, after going over the said trustees' records and books, and after making the fraudulent confiscations, assignments, transfers and deliveries, of the assets, funds and property of aforesaid benevolent trust estate to the personal account of William D. Noland, complainant herein, he then further demanded with a further threat of issuing warrants, the payment of aforesaid fraudulent additional taxation as he had calculated same as aforesaid, and finally the said Norman Hayward accepted the sum of \$80.45 in payment of the said additional taxation of the personal account of afore-

said William D. Noland, for the year of 1937, and the said additional taxation for the said year of 1937 was thus fraudulently established against the said William D. Noland, by the said Norman Hayward, Internal Revenue Agent and defendant herein, in conflict with \$63.85 said Hayward formerly created as 1937 tax, by his manner of fraud, in the fraudulent assignments, transfers and deliveries as made by him from the trustees' books and records of the assets, funds and property of aforesaid Dr. William D. Noland Trust Estate, Ltd., to the personal account of aforesaid William D. Noland, for the purpose of collecting an additional taxation, in addition to the reports and returns for income tax as made by the said complainant trustees of the Board of Trustees for Dr. William D. Noland Trust Estate, Ltd., and for which the said Norman Hayward gave a receipt to the said William D. Noland in the said sum of \$80.45. (Copies of aforesaid fraud and fraudulent assignments, transfers and [108] deliveries as made by said Norman Hayward, defendant, and receipt for money paid him, are under affidavit filed herein marked Exhibit "C".)

7.

That the aforesaid George D. Martin, Internal Revenue Agent in Charge, and John H. Cramer, Internal Revenue Agent, under date of January 26, 1945, in a letter addressed to Dr. William D. Noland Trust Estate, Ltd., William D. Noland, Trustee, with statements attached to said letter showing

that assets of said trust estate were fraudulently confiscated and assigned, transferred and delivered by said Internal Revenue Agents from the aforesaid benevolent trust estate to the account of William D. Noland personally with a provision in said statement that said William D. Noland pay an additional income taxation for the year of 1943, in the sum of \$1,061.77, plus a penalty of \$53.09, making a total additional tax and penalty in the sum of \$1,114.86, and said statements attached to said letter set forth that said additional tax and penalty must be paid to the said Internal Revenue Agent in Charge. (Copy of said letter and statements of five pages attached to said letter under affidavit filed herein and for identification marked Exhibit "B".)

9.

That there was further attached to aforesaid letter of January 26, 1945, a statement signed by John H. Cramer, Internal Revenue Agent, showing that again the assets, funds and property of the aforesaid benevolent trust estate had been fraudulently confiscated, assigned, transferred and delivered to the account of William D. Noland personally with a provision in said statement that William D. Noland must pay an additional taxation of \$656.75 for the year of 1942, said statement is dated November 3, 1944. [109] (Attention of the Court is here called to Exhibit "C" at page 1, which shows a receipt from Norman Hayward, Internal Revenue Agent, in the sum of \$80.45 in payment of

additional tax for 1942, after said Internal Revenue Agent had, from the trustees' records, fraudulently confiscated and assigned, transferred and delivered assets, funds and property of aforesaid benevolent trust estate to the personal account of William D. Noland for additional taxation against William D. Noland, pursuant to tax returns made by the trustee complainants hereof.)

10.

The aforesaid letter of Internal Revenue Agent in Charge, dated January 26, 1945, and aforesaid statement dated November 3, 1944, attached to said letter, is accompanied with a schedule of adjustments, shows that the funds, assets and property of the aforesaid benevolent trust estate was fraudulently confiscated and assigned, transferred and delivered to the personal account of William D. Noland and made the said assignment, transfer and delivery to personal property of William D. Noland, as per schedule of page 2 of Exhibit "B" filed herewith in support of this bill of complaint in equity, and on page 3 of said Exhibit B is schedule No. 1, of adjustments to Net Income as made by the said Internal Revenue Agent, whereby again the assets, funds and property of the said benevolent trust estate was fraudulently confiscated and assigned, transferred and delivered to the personal account of William D. Noland, and likewise in schedule 1 (a) on page 4 of said Exhibit "B", aforesaid Internal Revenue Agents have made fraudulent confiscations and assignments, transfers

and deliveries of the assets, funds, and property of said benevolent trust estate to the personal account of William D. Noland, and additional taxes levied against William D. Noland on said assets, funds and property of said benevolent trust estate without the permission and consent of the trustees for said benevolent trust estate, Dr. William D. Noland Trust Estate, Ltd., and said trustees are the complainants [110] in this entitled cause and action in the above entitled Court, and said Exhibit "B" hereof is filed herewith in support of this bill of Complaint in equity.

11.

That on page 5 of aforesaid Exhibit "B" herein, schedule No. 2, shows the manner in which the fraudulent confiscations, assignments, transfers and deliveries of the assets, funds and property of aforesaid trust estate have been made the personal property of William D. Noland for the purpose of fraudulently confiscating property for additional taxation against said William D. Noland personally in the sum of \$1,114.86 for the year of 1943.

12.

Complainants further allege, that upon receipt of letter dated January 26, 1945, from aforesaid George D. Martin, Internal Revenue Agent in Charge, which said letter was addressed to Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, William D. Noland, Trustee, 3944 Wilshire Blvd., Los Angeles, California (See Exhibit

“B”, filed herein), and was a notification to aforesaid trustees for said benevolent trust estate, that the said George D. Martin had through his office made an adjustment for the year of 1943, in an additional tax of \$1,061.77, plus a penalty of \$53.09, making a total additional tax and penalty of \$1,114.86, and in a statement attached to said letter, dated November 3, 1944, and signed by John H. Cramer, Internal Revenue Agent, cites where he assigned, transferred and delivered assets under the title of adjustments from the said benevolent trust estate and credited them to the personal account of William D. Noland personally, and then taxed said assets as the personal account of said William D. Noland, for the years of 1942 in the sum of \$656.75, and 1943 in the sum of \$1,114.86, as additional taxes. [111] And upon receipt of said notification, complainants filed a protest with said Internal Revenue Agent in Charge, to said assignments, transfers and deliveries by the aforesaid Internal Revenue Agents, from the Dr. William D. Noland Trust Estate, Ltd., to the personal account of William D. Noland for additional taxes, and after numerous hearings before the said Internal Revenue Service and Department, on December 29, 1945, a letter, addressed to William D. Noland, was received from the said Internal Revenue Service, of 417 South Hill St., Los Angeles 13, California, notifying of a deficiency of an additional tax liability in the sums of \$1,245.13 and a penalty of \$62.26, as shown in statement attached

to said letter, for the taxable year ended December 31, 1943, and said letter was signed by Joseph D. Nunan, Jr., Commissioner of Internal Revenue, and also by Raymond B. Sullivan, Acting Internal Revenue Agent in Charge. (See Exhibit "D" which is filed herein.)

13.

Complainants further allege that within ninety (90) days after receiving the aforesaid letter dated December 29, 1945, that complainants filed a petition for hearing on appeal for a redetermination of the aforesaid tax matter in controversy to the Tax Court of the United States, at Washington, D. C., said petition for hearing was filed with the said Tax Court of the United States, and on August 2, 1946, the said Tax Court of the United States ordered that respondent's motion to dismiss for lack of jurisdiction is granted. (See Exhibit E filed herein.)

14.

Complainants further allege that the business involved herein is conducted and operated under the aforesaid benevolent trust estate, as a benevolent institution, and as such has been in operation since June 1st, 1935, and is now operating as such [112] benevolent institution under aforesaid benevolent trust estate, which is organized by and under the terms and conditions of a contract by and between the parties hereof, organized under the Constitution of the United States, wherein said benevolent trust estate is to be administered by natural

person trustees in joint tenancy, holding in trust as to distribution of avails, acting under Citizenship, Common Law Rights of Contract, and Constitutional Rights, Federal Laws and Immunities vouchsafed to all persons, as set forth and provided in and by the Constitution of the United States of America.

15.

Complainants further allege that Section 167 of the Federal Internal Revenue Code, where the Trustee, Trustor and Beneficiary are the same, the income is taxable to the Trustor, as alleged by John H. Cramer, Internal Revenue Agent, in Exhibit "B", page 1, filed herein by complainants, wherein aforesaid and said Internal Revenue Agents and Representatives of the Federal Internal Revenue Service have assigned, transferred and delivered assets from the said Benevolent Trust Estate to the personal account of William D. Noland, and claiming authority to do so by said Section 167, of the Federal Internal Revenue Code, complainants contend and claim that the said Section 167, is not applicable to the aforesaid Dr. William D. Noland Trust Estate, Ltd., a Benevolent Trust Estate, organized as aforesaid as a benevolent institution under the provisions as aforesaid under the Constitution of the United States by a contract between the parties hereof, because the said Benevolent Trust Estate has a board of trustees who are the complainants herein, and also have numerous beneficiaries, therefore, the trustee, trustor and benefi-

ciary are not one and the same as claimed by the said John H. Cramer, Internal Revenue Agent, as set forth in said Exhibit "B" page 1, filed herein by complainants. [113]

16.

Complainants allege that the income tax returns for aforesaid benevolent trust estate for the years 1937, 1938, 1939, 1940, 1941, 1942 and 1943, have all been consecutively filed with the Internal Revenue Service of the United States for each of the said years by the complainants herein, wherein the aforesaid Internal Revenue Agents made aforesaid fraudulent confiscations, assignments, transfers and deliveries of assets from the aforesaid benevolent trust estate to the personal account of William D. Noland for the purpose of creating additional taxes without the consent and permission of the complainants hereof, and such confiscation of the assets of said benevolent trust estate was made by the aforesaid Norman Hayward, Internal Revenue Agent and Collector, by and through misrepresentation and fraud as set forth herein aforesaid; and the other aforesaid Internal Revenue Agents, after getting a false and fraudulent report from the said Norman Hayward, based upon his personal fraudulent manner in which he viewed the trustees' records and books of the aforesaid benevolent trust estate, the said other Internal Revenue Agents also made fraudulent confiscations, assignments, transfers and deliveries of assets from the complainants herein aforesaid benevolent trust estate based upon

the fraudulent scheme of the said Norman Hayward, for the purpose of creating additional taxation by fraudulent confiscation of the assets of said benevolent trust estate, the trustees of which said benevolent trust estate are the complainants in the above entitled cause and action. (Photo-copies of income tax returns made by complainants filed herein and marked Exhibit "F" for identification.)

17.

Complainants allege that in making the federal income tax returns for the year of 1942 that they paid the sum of Thirty-five and 64/100 Dollars (\$35.64); and for the year of 1943 that they [114] paid the sum of One Hundred Eighty Three and 36/100 Dollars (\$183.36) to the Internal Revenue Service at Los Angeles, California, and that under the date of March 8, 1944, a letter addressed to Dr. William D. Noland Trust Estate, Ltd., William D. Noland, Trustee, Re-Credit of \$8.91 paid 9-15-43, advising the aforesaid trustees of said benevolent trust estate, when filing the 1943 income tax return for above named estate, to attach carbon copy of said letter to face of Form 1041 for identification with the overpayment being held in a suspense account, which is to be credited to that form, was received. The said letter was signed Harry C. Westover, Collector, by W. R. Pearson, Cashier. Complainants contend and claim that the aforesaid paid amounts of \$35.64 for income tax for 1942, and \$183.36 for income tax for 1943, less the said amount of \$8.91 overpaid 9-15-43, which is a total of \$210.09,

which complainants contend and claim that the said \$210.09 should be refunded to the aforesaid complainants and trustees for said benevolent trust estate, as the said amount of \$210.09 was paid in error to the aforesaid Internal Revenue Service and Collector of Internal Revenue of Income Tax. (See Photo-copy of said letter of March 8, 1944, attached to income tax return of complainants for year of 1943, filed herein under Exhibit "F" so marked for identification.) Therefore, complainants demand the return of the said amount of \$210.09.

18.

The assets, funds and property of Dr. William D. Noland Trust Estate, Ltd., which have been assigned to William D. Noland personally by the aforesaid Internal Revenue Agents and Representatives, have been done so without the permission and consent of the Complainants in this action, and the complainants hereof contend that the aforesaid assignments, transfers and deliveries of the assets, funds and property of Dr. William D. Noland Trust Estate, Ltd., to the personal account of William D. Noland are fraudulent [115] confiscations of property belonging to aforesaid benevolent trust estate, and that the said complainants demand the return of the aforesaid \$80.45 which was paid to the aforesaid Norman Hayward by said William D. Noland for additional tax for the year 1937 on July 6, 1942, which said \$80.45 was furnished by complainants.

19.

Complainants further allege that complainants and William D. Noland are further threatened by the aforesaid Internal Revenue Agents and other Internal Revenue Agents to the extent that the carrying out of said threats will cause irreparable injuries, losses and damages to such an extent that it will cause a total loss of the assets, funds and property of the aforesaid benevolent trust estate for which complainants are the trustees, and that the destruction will leave nothing to recover, therefore, the only protection is a temporary restraining order, temporary injunction pending the determination of this action, followed with a permanent injunction, to protect the assets, funds and property of aforesaid benevolent trust estate.

Wherefore, Complainants demand relief and pray for process and judgment as follows:

1. That the complainants be granted and issued by the Court, a temporary restraining order, restraining the defendants and each of them, their representatives, officers, agents, servants and employees, and each of them, from unlawfully molesting, harassing, annoying, or in any manner unlawfully molesting or disturbing complainants herein, and from further unlawfully assigning, transferring and delivering the assets, funds and property of the Dr. William D. Noland Trust Estate, Ltd., to the personal account of William D. Noland or anyone else, pending the determination of this cause and action in the above entitled court. [116]

2. That the Court set a day and date for hearing the defendants and each of them, to show cause why the aforesaid temporary restraining order should not be made a temporary injunction.

3. That the Court issue a temporary injunction under the provisions of the aforesaid temporary restraining order, restraining and enjoining the aforesaid defendants and each of them as provided in said temporary restraining order aforesaid.

4. That the Court grant and issue a permanent injunction against the defendants and each of them and as provided in the aforesaid temporary restraining order and temporary injunction, permanently enjoining the said defendants and each of them and their representatives, agents and others as provided in aforesaid temporary restraining order and temporary injunction.

5. That the defendants be ordered to return to complainants the aforesaid amounts of \$80.45 and \$210.09, totally \$290.54, with interest, which was paid by complainants for William D. Noland personal additional taxes in the sum of \$80.95, wherein the assets, funds and property of complainants was fraudulently confiscated, assigned, transferred and delivered from the aforesaid benevolent trust estate to the personal account of said William D. Noland for additional unlawful taxation pursuant to the tax reports made and filed by complainants, and \$210.09 paid by complainant trustees in error.

6. That the complainants be awarded and given judgment in the sum of Fifty Thousand Dollars

(\$50,000.00) as compensated damages against the aforesaid defendants and each of them for fraudulently taking the trustees' books and records and making fraudulent confiscations, assignments, transfers [117] and deliveries from said records and books, and also likewise from income tax returns made by complainants to aforesaid Internal Revenue Service, from the aforesaid benevolent trust estate to William D. Noland personal account for additional taxes, and for causing to complainants endless mental anguish, molestation, annoyance, harassment, persecution, damages, losses and injuries since July 6, 1942, and continuously, including the present time.

7. That the aforesaid assignments, transfers and deliveries of assets, funds and property from the aforesaid benevolent trust estate to the personal account of William D. Noland for additional taxation, and aforesaid additional taxation, all be adjudicated and decreed as unlawful, null and void, and of no effect whatsoever.

8. That complainants be awarded a judgment for attorney fees if and when counsel is employed, for court costs and all other costs accruing in the prosecution of the above entitled cause and action.

Wherefore, complainants demand relief and pray for such other aid and relief, order or orders, as the Court may deem just and proper in the premises.

Exhibits "A", "B", "C", "D", "E", and "F"

filed herein in support of this bill of complaint in equity.

Dated: Los Angeles, California, August 27, 1946.

/s/ WILLIAM D. NOLAND,
William D. Noland Trust Estate, Ltd., and
/s/ WILLIAM D. NOLAND,
Personal. In Propria Persona.

Memorandum of points and authorities filed herein in support of Bill of Complaint in Equity hereof.

(Duly Verified.)

[Endorsed]: Filed Aug. 28, 1946. [118]

[Title of District Court and Cause]

ORDER AND JUDGMENT OF DISMISSAL AS
TO DEFENDANT JOSEPH D. NUNAN, JR.

On September 25, 1946, the defendant, Joseph D. Nunan, Jr., Commissioner of Internal Revenue, by his attorneys herein mentioned, appeared specially herein for the sole and limited purpose of asserting that this Court in the above entitled action has no jurisdiction over him, and that the above action as to him is improper on grounds of venue under the applicable Federal statutes. On November 19, 1946, the said defendant, Joseph D. Nunan, Jr., filed a Motion moving the Court to dismiss the above action as to him upon the ground that the Court had no jurisdiction of the person of said defendant, on the further ground that no process had been served

upon said defendant, and upon the further ground that under the applicable provisions of the Judicial Code a civil action such as the one above entitled could be brought against said defendant only in the District of which he is an inhabitant, and that venue as to said defendant was improper since the foregoing defendant was not an inhabitant of the Southern District of California or of the State of California.

The matter of the above Motion by said defendant having regularly come on for hearing on December 4, 1946, before the Honorable Jacob Weinberger, Judge presiding therein, and the complainant, William D. Noland appearing in propria persona, on behalf of himself individually, and also as trustee of the above Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, and the said defendant appearing by James M. Carter, E. H. Mitchell and Loran P. Oakes, counsel for such defendant, and all matters relating to the above Motion having been submitted to the Court for its decision, and the Court having considered the pleadings and other papers herein filed and heard the arguments of counsel for said defendant concerning the foregoing matter and the oral admission in open court at that time by the said William D. Noland appearing in the capacities above stated that said defendant was not an inhabitant of the Southern District of California or the State of California, and that the said defendant had accordingly been erroneously named as a defendant in the

above entitled proceeding, and the Court being fully advised in the premises and by reason of the above admission, the facts involved and by virtue of the law and other matters aforesaid, now renders its decision as follows:

It Is Hereby Ordered, Adjudged and Decreed:

1. That the above action be and the same is hereby dismissed as to the said defendant, Joseph D. Nunan, Jr., Commissioner of Internal Revenue.
2. That the Clerk of this Court shall enter this Order and Judgment of Dismissal.

Dated: This 8th day of January, 1947.

/s/ JACOB WEINBERGER,

United States District Judge.

Judgment entered Jan. 9, 1947. Docketed Jan. 9, 1947. Book 41, Page 307. Edmund L. Smith, Clerk.

[Endorsed]: Filed Jan. 9, 1947. [122]

[Title of District Court and Cause]

ORDER AND JUDGMENT OF DISMISSAL AS
TO DEFENDANTS GEORGE D. MARTIN,
NORMAN HAYWARD, RAYMOND B.
SULLIVAN, AND JOHN H. CRAMER,
INTERNAL REVENUE AGENTS

On November 19, 1946, the said defendants, George D. Martin, Norman Hayward, Raymond B. Sullivan and John H. Cramer, Internal Revenue

Agents (hereinafter referred to as the above four defendants), filed a Motion moving the Court to dismiss the above action as to them upon grounds set forth in such Motion including the ground that the complaint herein fails to state facts sufficient to justify the issuance of an injunction or the granting of any injunctive relief whatsoever herein, and the further ground that such Complaint fails to state a claim upon which relief as prayed for in the Complaint or [123] any other relief can be granted against the above four defendants or any of them.

The matter of the foregoing Motion by the above four defendants having regularly come on for hearing on December 4, 1946, before the Honorable Jacob Weinberger, Judge presiding therein, and the Complainant William D. Noland appearing in *Propria Persona* on behalf of himself individually, and also as trustee of the above Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, and the above four defendants appearing by James M. Carter, E. H. Mitchell and Loran P. Oakes, counsel for such defendants, and all matters relating to the above Motion having been submitted to the Court for its decision, and the Court having considered the pleadings and other papers herein filed and heard the arguments of the Complainant William D. Noland appearing in the capacities above stated and of counsel for the above four defendants concerning the foregoing matter, and the Court being fully advised in the premises, and by virtue of the law, the matters aforesaid and the

grounds hereinafter mentioned, now renders its decision as follows:

It Is Hereby Ordered, Adjudged and Decreed:

1. That the application and prayer in the Complaint and proceedings herein for an injunction or any type of injunctive relief whatsoever is hereby denied on the grounds (a) that the Complaint herein filed does not state a claim upon which relief can be granted by the issuance of any type of injunction or injunctive relief, (b) that it does not appear that any irreparable injury, loss or damage will result from the failure to issue any type of injunction or injunctive relief, and (c) as to the grounds set forth in the Complaint in connection with the prayer for injunction or injunctive relief, the Complainants have plain, speedy and adequate remedies at law to such an extent **that this Court** cannot properly grant any type of injunction or injunctive relief as prayed for in the Complaint herein.

2. That the above action not only with respect to the injunctive [124] relief therein prayed, but also as to all its other aspects and in its entirety, is hereby dismissed as to the above four defendants **on the ground that the Complaint herein filed fails to state a claim upon which relief as prayed for in the Complaint or any other relief can be granted against said four defendants or any of them.**

3. That the said defendants, George D. Martin, Norman Hayward, Raymond B. Sullivan and John

H. Cramer, Internal Revenue Agents, shall have judgment for and shall recover from the said Complainant William D. Noland individually and as trustee of the said Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, in the amount of the costs of said defendants, to be taxed by the Clerk of this Court in the sum of \$20.00.

4. That the Clerk of this Court shall enter this Order and Judgment of Dismissal.

Dated: This 9th day of January, 1947.

/s/ JACOB WEINBERGER,
United States District Judge.

Judgment entered Jan. 9, 1947. Docketed Jan. 9, 1947. Book 41, Page 304. Edmund L. Smith, Clerk.
[Endorsed]: Filed Jan. 9, 1947. [125]

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF EXTENSION
OF TIME ON APPEAL

State of California,
County of Los Angeles—ss.

William D. Noland, being first duly sworn, deposes and says: That he has been delayed in the preparing appeal in the above entitled matter through delay in acquiring transcript paper, re-

porter's transcript of proceedings, and also through and by illness, to such an extent, that an extension of time is necessary, as it is impossible to complete appeal without an extension of time of ninety (90) days from date of filing notice of appeal which is May 4th, 1948, that said notice was filed.

Wherefore, William D. Noland prays the court to extend the time on appeal.

/s/ WILLIAM D. NOLAND,
Complainant.
In Propria Persona.

Subscribed and sworn to before me this 7th day of June, 1948.

(Seal) /s/ BEULAH E. DONATH,
Notary Public, in and for the County of Los Angeles, State of California.

My Commission Expires, Nov. 16, 1950.

[Endorsed]: Filed June 4, 1948. [126]

[Title of District Court and Cause]

ORDER EXTENDING TIME ON APPEAL

The Court, having read the affidavit by William D. Noland, complainant in the above action, and good cause appearing therefor, for an extension of time in preparing appeal in above entitled action:

It Is Ordered, that the time to prepare and com-

plete the appeal in above entitled case and file same is hereby extended to August 2, 1948.

/s/ J. F. T. O'CONNOR,

Judge of the above entitled
District Court.

[Endorsed: Filed June 7, 1948. [127-8]

[Title of District Court and Cause]

STATEMENT OF POINTS UPON WHICH
APPELLANTS RELY UPON ON APPEAL

Claims of Appellants, William D. Noland, Trustee, and William D. Noland, Personal, in submitting statement of points, are as follows:

Point 1.

That Dr. William D. Noland Estate, Ltd., is a benevolent trust estate, and a charitable organization, organized by a contract by and between the trustees, and is established by said contract to be administered by natural person trustees in a joint tenancy, holding in trust as to distribution of avails, acting under citizenship, common law rights of contract, and constitutional rights, federal laws and immunities vouchsafed to all persons, as set forth and provided in the constitution of the United States of America, and so organized on June 1, 1935, with a board of trustees and numerous beneficiaries who are poor people and poor children who are unable to pay for services. [129] And the District Court of the United States in and for Southern District of California, Central Division, in making and entering summary judgments

against the second amended bill of complaint is a denial of due process of law.

Point 2.

The aforesaid District Court of the United States in and for Southern District of California, granted motions for summary judgments and dismissed the second amended bill of complaint, and the record shows that the aforesaid Internal Revenue Collectors and Agents, cited section 167, Title 26, of the Federal Internal Code in support of assigning, transferring and delivering assets, funds and property from the aforesaid benevolent trust estate to the account of William D. Noland personally, and said section 167 of the Federal Internal Revenue Code, provides, that where the trustee, trustor, and beneficiary are one and the same, the income tax is charged to the trustor, and in the aforesaid benevolent trust estate there are a board of trustees and numerous beneficiaries, the said granting of motions for summary judgments and dismissing of the second amended bill of complaint by the said District Court was a denial of due process of law.

Point 3.

Aforesaid section 167 of the Federal Internal Revenue Code does not apply to the aforesaid benevolent trust estate and it does not apply to William D. Noland personally, therefore, the aforesaid Internal Revenue Collectors and Agents violated section 23, Subdivision (o) which provides for charitable and other contributions, and paragraph (2) provides, a corporation, trust, or community

chest, fund, or foundation, created or organized in the United States or in any possession thereof or under the laws of the United States or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to [130] children or animals, no part of the net earnings of which enures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation. The said provision of Title 26, section 23, (o) (2) is the law that governs the aforesaid benevolent trust estate and not the aforesaid section 167, Title 26, of the Federal Internal Revenue Code as cited by said Internal Revenue Collectors and Agents, in suport of their unlawful activities as set forth in the record on appeal, and the United States District Court, Southern District of California, Central Division, in making and entering summary judgments and dismissing second amended bill of complaint was a denial of due process of law.

Wherefore, appellants, respectfully submit concise statement of points herewith on which they rely upon on appeal.

Dated. Los Angeles, Calif. June 28, 1948.

Respectfully Submitted,

/s/ WILLIAM D. NOLAND,

Trustee, In Propia Persona.

/s/ WILLIAM D. NOLAND,

Personal, In Propia Persona.

[Endorsed]: Filed July 1, 1948. [131]

[Title of District Court and Cause]

**DEFENDANTS' AMENDED DESIGNATION
OF ADDITIONAL PORTIONS OF RECORD
NECESSARY FOR CONSIDERATION OF
THE COURT ON APPEAL**

Come now the defendants herein, by and through their undersigned attorneys and hereby designate the following additional portions of the record as portions necessary for consideration on appeal:

1. Defendants' motion to dismiss together with affidavits filed September 6, 1947;

2. Plaintiff's objections to motion to dismiss filed September 10, 1947;

3. This designation of additional portions of record necessary for consideration of the court on appeal.

Dated: July 8, 1948.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL and
GEORGE M. BRYANT,
Assistant U. S. Attorneys.

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

By /s/ E. H. MITCHELL,
Attorneys for Defendants.

It Is Hereby Stipulated by the complainants undersigned that the foregoing amended designation may be filed by the defendants.

Dated: This 9th day of July, 1948.

/s/ WILLIAM D. NOLAND,
Trustee, In Propia Persona.

/s/ WILLIAM D. NOLAND,
Personal, In Propia Persona.
Complainants.

[Endorsed]: Filed July 9, 1948. [133]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 133, inclusive, contain full, true and correct copies of Motion to Dismiss; Affidavit in Support of Motion to Dismiss; Objection to Motion to Dismiss; Second Amended Bill of Complaint; Affidavit in Support of Second Amended Complaint Exhibit A. Attached; Affidavit in Support of Second Amended Complaint Exhibit E Attached; Notice of Motion; Motion by Defendant Harry C. Westover for Summary Judgment; Affidavit in Support of Motion by Defendant Harry C. Westover for Summary Judgment; Motion by Defendants Other Than Harry C. West-

over for Summary Judgment; Affidavits of George D. Martin, Raymond B. Sullivan, John H. Cramer, Norman Hayward in Support of Motion for Summary Judgment; Objection to Motion by Defendants Other Than Harry C. Westover for Summary Judgment; Objection to Motion by Defendant Harry C. Westover for Summary Judgment; Summary Judgment in Favor of Defendant Harry C. Westover; Summary Judgment in Favor of Defendants George D. Martin, Norman Hayward, Raymond B. Sullivan and John H. Cramer; Motion to Amend Complaint; Minute Order Entered March 30, 1948; Docket Entries 3-19-48 to 5-4-48; Notice of Appeal; Cost Bond on Appeal; Designation of Record on Appeal; Bill of Complaint and Application for Temporary Restraining Order; Temporary Injunction and Permanent Injunction in Case No. 5716-W; Separate Orders and Judgments of Dismissal as to Defendant Joseph D. Nunan, Jr. and George D. Martin et al in Case No. 5716-W; Affidavit and Order Extending Time to Docket Appeal; Statement of Points Upon Which Appellants Rely on Appeal and Defendants' Amended Designation of Additional Portions of Record on Appeal which, together with copy of reporter's transcript of proceedings on March 30, 1948 and April 19, 1948, transmitted herewith, constitute the record on appeal to the United States Circuit of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing

record amount to \$16.35 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 15th day of July, A. D. 1948.

(Seal)

EDMUND L. SMITH,

Clerk.

By /s/ Theodore Hocke,

Chief Deputy.

In the District Court of the United States in and for the Southern District of California, Central Division

Honorable Charles C. Cavanah, Judge presiding.

No. 7315-O'C—Civil

WILLIAM D. NOLAND, H. K. MILLER and
HARRY R. MAXWELL, Trustees, Dr. WIL-
LIAM D. NOLAND TRUST ESTATE, LTD.,
a Benevolent Trust Estate, and WILLIAM D.
NOLAND,

Plaintiffs,

vs.

HARRY C. WESTOVER, Collector, United States
Treasury Department, etc.; GEORGE D. MAR-
TIN, etc.; NORMAN HAYWARD, etc.; RAY-
MOND B. SULLIVAN, etc.; and JOHN H.
CRAMER, etc.;

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
Tuesday, March 30, 1948

Appearances: For the Plaintiffs: William D. Noland, in pro. per. For the Defendants: George M. Bryant, Assistant U. S. Attorney; Loren P. Oakes, Special Attorney, Bureau of Internal Revenue. [1*]

The Court: You may proceed.

The Clerk: Case No. 7315, William D. Noland and others versus Harry C. Westover and others.

Mr. Noland: I am ready.

Mr. Oakes: The defendant is ready.

The Court: Tell me something about this case.

Mr. Oakes: In this case the complainants originally sued Harry C. Westover, the Collector of Internal Revenue and of course I represent the Collector as Attorney for the Bureau of Internal Revenue.

After the original complaint was filed, the complainant amended the complaint so that in addition to suing the collector they named four additional defendants.

Now, all of the additional defendants are Internal Revenue Agents, so now we have a suit against five defendants, whereas, originally, the suit was against the Collector of Internal Revenue only—the Government.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

The Court: In other words, they amended the amended complaint and brought in four more defendants?

Mr. Oakes: That is it exactly.

The Court: Did they serve them?

Mr. Oakes: All served, yes.

The Court: Very well. [2]

Mr. Oakes: So the issues are a little different with respect to the Collector of Internal Revenue and the Internal Revenue Agents.

Consequently the Government filed one motion for summary judgment on behalf of the Collector and filed a separate motion for summary judgment on behalf of the four additional defendants, the four additional defendants being Internal Revenue Agents.

So, the first motion I will present to your Honor will be the one on behalf of the Collector of Internal Revenue.

We began that motion by stating the grounds in support of the motion for summary judgment on behalf of the Collector, and the first ground was that the defendant Collector was entitled to summary judgment on the ground of stare decisis. I use that term because the same complainants sued the same Internal Revenue Agents in a prior proceeding in this court which was heard by Judge Weinberger.

Judge Weinberger granted the Government's motion to dismiss in the prior suit.

The Court: Is this the same alleged cause of action or a different cause of action?

Mr. Oakes: The cause of action against the four Internal Revenue Agents was a requested injunction. That was denied. There has been no subsequent attempt to get an injunction—to get injunctive relief so that is out of the [3] picture at this time. However, in the current suit there is an attempt to obtain declaratory relief as to what the tax liabilities might be, and there is an attempt to allege fraud against these Internal Revenue Agents.

The Court: Was that presented to Judge Weinberger in the other suit?

Mr. Oakes: Absolutely.

The Court: The same cause of action?

Mr. Oakes: That is the Government's position.

The Court: Do the pleadings show that?

Mr. Oakes: Yes. An examination of the complaint before Judge Weinberger will show that the complainants charged that the Internal Revenue Agents acted fraudulently and that was an issue before Judge Weinberger. He decided that in favor of the Internal Revenue Agents.

And also in the prior litigation there was an attempt to obtain declaratory relief and have the court adjudicate the tax liabilities involved. And that was also held in favor of the Internal Revenue Agents in the prior proceedings. The prior proceedings are No. 5716-W.

So, in presenting this motion on behalf of the Internal Revenue Agents, we have argued that the prior proceeding before Judge Weinberger, was res adjudicata.

Now, we cannot claim that it is *res adjudicata* against the defendant Collector because the Collector was [4] not a party to the prior proceedings, so in the alternative we merely state that it is *stare decisis* as to the Collector because the Internal Revenue Agents, in the former proceedings, were alleged to have acted fraudulently and refunds were sought in the prior proceeding—declaratory relief was sought in the prior proceeding.

All those matters were adjudicated in favor of the Agents by Juge Weinberger, so we say that it is *res adjudicata* in this proceeding as to the Agents. And as to the Collector, we feel that on the ground of *stare decisis* the Collector should likewise not be liable because the Collector of Internal Revenue does not have control over Internal Revenue Agents.

I have submitted rather comprehensive memorandums of authorities in these cases and I pointed out that under Chapter 42 of the Internal Revenue Code, at Section 3990 of the Code, Deputy Collectors are under the supervision and control of the Collector of Internal Revenue Agents, but under Chapter 43 of the Code there is a separate section as to Internal Revenue Agents.

The Internal Revenue Agents are under the control of the Revenue Agent in charge. Consequently the Collector of Internal Revenue would have no control over what Internal Revenue Agents did.

It is just a matter of the statute. The Collector [5] has control of his deputies but he cannot boss

around the Internal Revenue Agents who have a different superior officer, namely, the Revenue Agent in charge.

Now, an important fact in connection with this is that the Collector, namely, Mr. Westover, took over his duties as Collector in this district on July 1, 1943, and the acts in question of which the complainants have made complaint, took place prior to July 1, 1943. So, Collector Westover wasn't even in the Government service during these earlier years and he obviously could not have been controlling the Internal Revenue Agents whose acts are complained of, not only in the pleadings before your Honor in this case, but also in the pleadings in the case before Judge Weinberger in which the agents were sued.

In fact the agents in that case were sued for fifty thousand dollars damages for their allegedly fraudulent acts and Judge Weinberger decided that in favor of the Internal Revenue Agents by dismissing the action against them.

Now, while I am still handling this motion on behalf of the Collector, I want to point out that the relief which is now sought is to obtain refunds.

Now, of course when any taxpayer wants to obtain refunds he is privileged to sue the Collector who collected the taxes in question. But in this case Collector Westover [6] didn't start on his duties as Collector until July 1943, and it is shown by the pleadings that all of the collections here were made prior to July 1, 1943. So, we think

that point is the most obvious point that we would care to present to your Honor.

I have cited numerous cases in the memorandum of points and authorities. The leading case is by the United States Supreme Court. It is *Smietanka vs. Indiana Steel Company*, 257 U. S., page 1.

That case simply holds that suit cannot be brought against one Collector for taxes which were collected by his predecessor in office. So, I don't think there can be any question whatsoever about that principle.

In this case the Collector, Collector Westover, is sued with respect to collections which were made by a prior collector, a man by the name of Rogan, who is not even a party to the suit.

That is the principal ground on which we ask for summary judgment on behalf of Collector Westover, namely, that he took office subsequent to these collections and is not the party who collected them, and hence, the suit is improperly brought against him.

And the other grounds supporting this motion by Collector Westover is as I mentioned before, he didn't have control over these Internal Revenue Agents and they made [7] their collections prior to the time at which he took office.

In the motion of Collector Westover I have specified that many of the arguments which we will present on behalf of the Agents also apply to support the summary judgment in favor of the Collector.

That, briefly, is all I set forth in my motion for summary judgment on behalf of Collector Westover and the other motion has more grounds. In fact, it goes into more detail and raises points which are in favor of summary judgment, in favor of the Internal Revenue Agents themselves through a separate motion filed on behalf of the Internal Revenue Agents.

That is all I care to mention at this time.

The Court: What is in your second motion?

Mr. Oakes: Well, if it is agreeable to your Honor, I will now proceed to my second motion.

The Court: Yes.

Mr. Oakes: Now, the second motion is on behalf of the four Internal Revenue Agents who were brought into these proceedings.

Now, the first grounds supporting the motion for summary judgment on behalf of the agents, is the ground I have already intimated to your Honor, and that is that we feel the prior proceeding before Judge Weinberger disposed of every issue that is now presented and, hence, the first [8] ground is *res adjudicata*, and I have cited authorities in support of that.

The motion to dismiss in the proceeding before Judge Weinberger, took the place of what would previously have been known as a general demurrer. In other words, we attack the sufficiency of the complaint and were upheld in that motion.

Now, I have also cited authorities that any adjudication on a motion such as that is an adjudica-

tion on the merits and therefore is entitled to be treated as *res adjudicata* when the case was disposed of in that fashion.

The second ground in support of the motion by the agents, is that there have been only two refund claims filed, according to the exhibits attached to the amended complaint.

These refund claims do not involve very large amounts. One of them sets forth an item of \$80.45. That relates to taxes for the year 1937.

The only other claim covers an item of \$35.64 for the year 1942.

Now, as to these agents the same principle applies that I mentioned in connection with the Collector of Internal Revenue.

Collector Westover didn't make any collections, [9] therefore he can't be sued for what he did not collect. Likewise, as to these four Internal Revenue Agents. Their duties were to investigate and so none of them collected any of these funds. As to one of the four agents, a man by the name of Hayward, he did receive some cash from Dr. Noland, and as a matter of convenience and on behalf of Dr. Noland for the Trust, he turned that in to the Collector—Collector Rogan, who had the job of collector prior to the time that Collector Westover took office.

We think it is very immaterial as to the fact that Agent Hayward had this money in connection with transmitting it to Collector Rogan, because that particular payment was made more than three years prior to the time that the refund claim was filed.

That is a further point that we need to present. That is, that the \$80.45 is outlawed by the statute of limitations and it would be wholly immaterial as to who collected that amount because no refund claim to that amount was filed within the three years allowed by the statute.

So, the essence of that point is that the agents did not collect and the only person who could be sued for amounts collected would be Collector Rogan, who is not a party to this suit. The only Collector who is in this litigation is Collector Westover, and he took over his [10] duties after the amounts were paid by Dr. Noland or by the Trust.

Now, we have a third ground in support of the motion by the agents. That ground is that there is a lack of indispensable parties complainant.

This suit purports to be brought on behalf of certain Trustees. The only party, as I understand it, who is before the court is Dr. Noland himself. He has brought the suit in his individual capacity and also has brought the suit as one of the three Trustees.

Now, it is also a matter of record that Dr. Noland is not an attorney at law. Of course we don't have any objection to his appearing here on behalf of himself. That is his legal privilege. But he doesn't have the right to represent any Trustees other than himself; and the other Trustees are not before the court and I believe that the latest amendment by Dr. Noland is to the effect that he does not intend to make any attempt to bring the other Trustees before this court.

Now, in the supporting memoranda on this point, of lack of indispensable parties, we have made a quotation from the document which is the so-called charitable Trust. That charitable Trust specifically provides that the Trustees must act collectively.

Now, since the word "collectively" was used, that [11] obviously connotes that the three Trustees must all join or act collectively and therefore no single Trustee, such as Dr. Noland, would have the requisite authority to come in and bring this litigation. Even if the Trust agreement had not used that term, that collective action was required, nevertheless, there are a great many authorities, and I have taken the liberty of citing a few. One very brief quotation from 65 Corpus Juris, 1032:

"Generally speaking in a suit relative to the establishment and enforcement of a trust, the trustee is a necessary party. If there are two or more trustees all must be made parties."

So, here we have a trust with three parties and it is imposible to bring in three of them because Dr. Noland is not an attorney and cannot represent the Trustees other than himself. Under the law all three Trustees would have to be parties and only one of them is here and the document required collective action by all three Trustees.

We don't have to go into the merits of this case, but just in passing, this is a situation where if the merits are ever litigated in some subsequent lawsuit the issue will be whether the income which Dr. Noland earned as a Doctor of Chiropractic, whether

that income should go on the income tax return of Dr. Noland as an individual; and [12] that has been the position of the Government in its reports by the Internal Revenue Agents, which Dr. Noland complains about. Or whether his earnings as a chiropractic doctor should be placed on the income tax return filed on behalf of this so-called charitable trust.

Now, certainly there is no dispute about the fact that these earnings, which I understand run 10 or 15 thousand dollars a year, would have to go on somebody's income tax return. They would either have to be on the income tax return of the Trust, as alleged by Dr. Noland, or they would have to go on the individual income tax return of Dr. Noland as alleged by the Government.

So, we have this peculiar situation where, since it is a question of whether the income is taxed to the Trust or whether it is taxed to Dr. Noland, Dr. Noland obviously has a personal interest in the matter and for that reason we say that he is not qualified to represent the trust because his interest would be to transfer or allocate the income to the Trust rather than having it allocated to his individual income tax return.

And on that basis we dispute the right of Dr. Noland to bring this action which involves a trust with three different Trustees.

Now, going to the fourth point, which is altogether separate, we point out in our motion on behalf of the [13] Internal Revenue Agents that this

amended complaint seeks to obtain a declaratory judgment and have this District Court pass on those questions which I have just set forth, namely, whether the income is taxable to the individual or taxable to the Trust. And since the complaint seeks declaratory relief and seeks an adjudication on those tax issues that I have mentioned, we state that the complaint violates Section 274 (d) of the judicial code. That section reads as follows:

“In cases of actual controversy except with respect to federal taxes, the courts of the United States shall have power upon petition
* * * * * to declare rights and other legal relations of any interested party petitioning for such declaration * * *”

and so forth.

Therefore, Congress in enacting the judicial code specifically provided the parties could come into Federal courts and obtain declaratory relief: “Except with respect to federal taxes.”

So, we have the most specific provision there in Section 274 (d) of the Judicial Code. That is Section 400, Title 28, U.S.C.A., to the effect that declaratory relief cannot be obtained in this court on federal tax issues. [14]

We have also cited numerous cases upholding that principle where declaratory relief is not available on federal tax issues.

The fifth ground in support of the motion would be that the refund claims are inadequate. In other words, there is a variance between the relief sought

by the refund claims and the relief sought in the complaint.

The variance is fatal and therefore this is a separate ground upon which the Internal Revenue Agents, as well as the Collector, are entitled to summary judgment.

The refund claims were filed on behalf of the Trust, and copies of those refund claims were attached to the amended complaint by Dr. Noland.

Now, since the refund claims specifically provide that the refunds sought by the Trust and Dr. Noland, admits that he cannot bring the other Trustees into this proceeding.

That is a further ground why the court cannot grant the refunds which have been sought.

And Point No. 6 in support of the motion on behalf of the agents is the statute of limitations which I have already indicated to your Honor.

Refund claims have to be filed within three years from the date on which the return was filed. I have quoted the statute which provides when suits can be brought in the Federal courts and the statute which provides the deadline [15] as to filing a refund claim. And then just to apply the law to the facts, we have recited in our motion and in our memorandum that the amended complaint itself shows that the claim for refund was filed March 15th, 1946, and the complainants' papers also show that the payment of \$80.45 was made July 6, 1942.

So, obviously, if payment was made on July 6, 1942, that is more than three years prior to March 15, 1946, and hence the three-year period had al-

ready passed prior to the time that this refund claim was filed.

The only other refund claim also purports to have been filed March 15, 1946, and dates of payment were on or before March 15, 1943, according to the complainants' papers here and again it would appear that more than three years have elapsed between the date of payment and the date of filing of the refund claim.

Now, I will pass on to Ground No. 7 in support of the motion by the agents.

I have indicated previously the nature of that, namely, that what the agents did was to determine that the income earned by Dr. Noland in his profession should be taxed to him rather than be taxed to a charitable trust. A charitable trust can't practice chiropractic. The earnings were by the doctor himself and therefore the agents applied authorities, such as *Lucas vs. Earl*. That case contains a very famous sentence by the late Mr. Justice Holmes to [16] the effect that:

"The fruits of the tree should be attributed to the tree upon which they grow."

In other words, in a case such as that a man who makes earnings cannot arbitrarily allocate them to his wife or someone else. So, in this case we likewise contend that the earnings by the doctor cannot be allocated to a trust.

We have also cited numerous other cases which apply that same principle in the case of *Lucas vs. Earl*.

But we do not mean to get into the merits of that question because the merits cannot be argued when there haven't been proper refund claims and there haven't been proper parties and when the statute of limitations applies and when these issues were previously adjudicated. And on the other grounds that this isn't the proper time to go into the merits. But I mention the merits because Dr. Noland alleged in his complaint that the Internal Revenue Agents acted fraudulently, so we have replied and state the only thing which they really did was to make this determination which we believe was sound and we would support that if this case is ever litigated on the merits.

Now, the final ground in support of the motion for summary judgment is to the effect that there hasn't been any claim stated or facts alleged upon which relief can be [17] granted. In other words, that ground is equivalent to what was previously known as a general demurrer, and that was the ground that we urged before Judge Weinberger when the same Revenue Agents were sued on the same allegations.

Now, the allegations throughout the amended complaint before your Honor and the allegations in the complaint before Judge Weinberger, were to the effect that the agents had acted fraudulently and maliciously and didn't act in good faith in making these determinations.

So, in this final ground we have cited authorities to the effect that for a complainant to merely allege

legal conclusions such as fraud allegations, is inadequate. It would have to have been specific—specific facts should have been recited so the court could make the legal conclusion as to whether the acts in question or the facts constituted fraud.

We also point out that if the complainant had properly pleaded the facts relating to fraud, nevertheless it would be un-availing and would not be the basis of any relief on the ground of authorities such as *Cooper vs. O'Connor*, 99 Fed. (2d) 135.

It so happens that this case until yesterday was assigned to Judge O'Connor and Judge O'Connor in his earlier career was Comptroller of the currency under the Federal Government, and while Judge O'Connor was Comptroller [18] of the Currency he was sued for action which he took and made in his official capacity as Comptroller of the Currency.

In this suit against Judge O'Connor, when he was the Comptroller of the Treasury, it was held by the Court of Appeals for the District of Columbia:

“The Acts of Appellees were performed in the discharge of their official duties and the motives with which those duties were performed are immaterial.”

That is the governing principle here. Even if Dr. Noland could prove that these agents acted maliciously, which of course we deny, under the principle of this O'Connor case a public official must go out and perform his duties. He must make a de-

termination. He might make a wrong determination, and if he does the courts are open to a taxpayer who files the proper refund claims and brings suit within proper time and in the proper fashion.

This complainant has not done so. Now, the only other case I would like to mention is *Standard Nut Margerine vs. Mellon*.

That case was cited in the case against Judge O'Connor while he was Comptroller of the Currency.

Now, the Nut Margerine case was brought against Mr. Andrew Mellon when he was Secreary of the Treasury. It was also brought against Mr. Ogden Mills when he was [19] Undersecretary of the Treasury and they brought in a lot of other Government officials and it was held in that *Standard Nut Margerine case vs. Secretary Mellon*, and that was also a decision by the Court of Appeals for the District of Columbia, that Government officials when they go out and make determinations they must do their duty and they are not subject to being sued by some taxpayer who doesn't like the determination.

That is happening all over the country. Taxpayers who disagree with the examining agents are frequently not pleased about it, but our courts would be in a chaotic condition if every taxpayer who didn't agree with the agents who made the determination could come in and bring suit and say the agents acted fraudulently and maliciously.

So, in that case against Secretary Mellon, which I have just cited, and the official citation is 72 Fed. (2d) 557, there is an exhaustive treatise on the authorities. They go back and point out the cases where judges were sued. Obviously a judge is an official and he has to make his determinations within the scope of his official duties and a person who doesn't like the judge's decision obviously cannot bring a civil suit against the judge and state that his action was malicious and fraudulent. Those motives are held to be immaterial and that is why we have contended right along that these charges of fraud against our Internal [20] Revenue Agents have no proper place in these proceedings and cannot form the basis for any relief.

Now, that is all I have on that point.

In connection with discussing all these grounds I feel that I did overlook a minor point. The document which established the charitable trust discloses three different parties as the original Trustees. By the time this suit is brought, however, instead of those three original Trustees we see that the Trustees are now William D. Noland, H. K. Miller, and Harry R. Maxwell. Those three Trustees are not the three Trustees who were listed in the original Trust agreement establishing this so-called charitable trust.

So, we have pointed out in my memos in the file that it was necessary for there to be some explanation showing that the parties who now bring the suit properly succeeded to the different parties

who were the Trustees when the action was brought. In other words, if A, B, and C were the Trustees according to the original Trust agreement, it is improper for the suit to be brought in the names of, we will say, X and Y, when X and Y are new parties, and there is nothing in the pleadings to explain how the additional Trustees got in. That point is only cumulative, however, because since Dr. Noland isn't a lawyer he cannot represent the other Trustees and we feel they have to be in [21] here because the Trust is before the court in the sense that there is an attempt to litigate the tax liabilities of the Trust.

Now, the most recent development in these proceedings is a document served on the Government on March 19, 1948. That document is entitled "Proposals to Amend Bill of Complaint," and one of the things which will doubtless be advanced to your Honor this morning is whether the Bill of Complaint can be amended as set forth in this document which was served on the Government a few days ago.

Part of the relief requested in these Proposals to Amend is to—well, I will quote it:

"By mistake and error names of other Trustees were mentioned as shown above merely to show that there was more than one trustee and the Bill should be corrected by amending said names, by omitting said names."

So if your Honor should grant that and allow Dr. Noland to strike the additional trustees, we

would claim that there is a lack of indispensable parties because then it would only be one trustee, whereas there were actually three trustees.

Then these Proposals to Amend also request the court to allow the prayer for relief to be changed. I think it is immaterial whether the prayer for relief is [22] changed because there is no change in the facts alleged. So, if there is any amendment along this line we would merely ask your Honor to have the motions for summary judgment filed against the amended complaint to also stand against the amended complaint as further amended by these Proposals.

We don't think that the complainant is entitled to these additional amendments because he was allowed the privilege to amend his complaint once and these Proposals come at a late date, after the case has been at issue for several months, in the sense that our motions have been pending. But if the complainant is to be granted the privilege of further amending we would merely request that our motion for summary judgment stand against the complaint as still further amended.

The only other point I might mention is, we have endeavored to get the file before Judge Weinberger before your Honor so you can take judicial notice—

The Court: The clerk can put them on my desk.

Mr. Oakes: We have the affidavits as to when Collector Westover took over his duties and perhaps that could also be judicially noted. At least

there is an affidavit on file covering when Collector Westover took office.

The Court: Those files were placed on my desk this morning. [23]

Mr. Oakes: That is all.

The Court: You may proceed.

Dr. Noland: Your Honor, I object to the motion of the defendant for res adjudicata in its entirety. I also object to all the motions in their entirety upon the ground that there is not one citation in point.

All of their citations are pertaining to corporations or individuals. Not one citation pertains to a charitable organization or institution of any kind. Therefore, I feel that their motions should be denied.

That this honorable court may better understand the position which I take here, it is true I am not a lawyer. I am a layman. I am not representing the Trust. The Trust is not a complainant. I am not representing the other Trustees. I am not representing anyone or anything except my personal interests as William D. Noland, Trustee under the contract, and William D. Noland personally.

The reason that the Bill was written in the manner in which it was, was merely to show that there were other trustees and for which the Government and the agents took the stand of 167. 167 did not apply to this particular Trust and did not apply to me as an individual personally. 167 is where the Trustee, the Trustor and beneficiaries are one

and the same person. That is not true in this case. I will not go into that at length because it is all [24] on file here.

This Trust was established by the late Judge Franklin Bull.

He showed me the papers of hundreds of trusts that he had established.

For the court's information as to his qualifications, he was connected in previous years in various ways with the United States Government. And as he stated to me—that is, he showed me his personal files.

This Trust was created by three Trustees and it has many, many beneficiaries. Literally they go into hundreds or several thousands, people who have benefitted by the Trust.

So, all of the citations by opposing counsel given to this honorable court, are not in point.

Now, in regard to the case that was filed before the Honorable Judge Weinberger, that was a suit in a court of equity and not a court of law.

Various questions came up at that time as to whether or not I was representing the Trust, representing other individuals, and the Honorable Judge Weinberger asked me who I was representing. I told him myself as a Trustee and myself individually. And if my memory serves me right, he further asked me how many people I was in court and I told him two,—William D. Noland, Trustee and William D. [25] Noland personally; that I was not representing the Trust or the other individuals;

that the names were merely to show that 167 did not apply to me.

The Honorable Judge Weinberger ruled that I had that right and privilege and I was in order and would not be in jeopardy if the court or the Bar Association permitted me to proceed and granted that I was right.

The Honorable attorney made the statement in substance, that the case was dismissed on this, that and the other, which I will not go into. You have heard that.

If my memory serves me rightly the Honorable Judge Weinberger dismissed this case, also at my request, upon the ground that the claims that were filed and carried to the high tax court in Washington had not lapsed for six months, according to the laws which I did not know. And the honorable attorney of the technical department of the United States Government undoubtedly did not know it either, because he instructed me what to do and how to proceed. He is the man that told me that when it was thrown out in Washington that I could immediately file suit in the Federal court.

So, the Honorable Judge Weinberger made the statement—he said:

“Doctor, if you can show me any law to that effect—”, and this is the sum and substance of it, “where [26] I can grant any relief,” he says, “because these things were passed by Congress,” and he quoted a celebrated case.

In other words, I had brought suit before the six months had elapsed and that cannot be done.

So, it is my understanding—and at that time and now I so understood, that the case was dismissed because the suit was filed before the six months elapsed after the high tax court in Washington threw it out.

And as an explanation to this honorable court, I would like to state why the tax court threw it out. The entire tax matter was started in the name of Dr. William D. Noland Trust Estate, Limited. It was carried through the various departments here in Los Angeles, to the technical department for which my understanding is that Attorney Tandro is the head of or Chairman.

So, naturally as it was started that way, in principle, you as a lawyer know that you cannot change horses in the middle of the stream in legal procedures.

The opposing counsel, not these gentlemen, in the tax matters that were handled at that time, the technical departments, when it got up before Washington they changed the title or about halfway going up. As a legal procedure I stayed with the original title as it was, so when we got before the tax court in Washington they were under one title and I was under another and consequently the Government [27] tax court threw it out.

In other words, your Honor, I am a layman. My house is 100 per cent in order and the purpose of the entire situation was to help poor, helpless, crippled people without money. For doing that I was charged with doing something that was nothing

short of sharp practice. Me being a layman I was not quite as fast on the trigger mentally as a lawyer. I did not know how to get around it, so Tandro told me how to get around it by filing a suit in equity and automatically, as he stated to me, and as anyone knows, that in a court of equity it levels off the inequalities of law.

But to make it brief, Judge Weinberger, which was my understanding at that time and now, he dismissed it upon the ground that the suit in equity was filed before the six months elapsed. In other words, after the tax court dismisses, throws it out or whatever the case may be, you cannot file suit in any court until six months have elapsed.

Judge Weinberger brought it up and I stated that under the situation that I could not show him where he could do differently; that that was an act of Congress. And if I am not mistaken he stated that.

Now, that suit was filed against individuals and not against the Government. It was a suit in equity before the Honorable Judge Weinberger, and it was so argued by [28] my honorable opposing counsel at that time. They actually stated that the individuals were not responsible—the Government was, and if I had any complaint it should have been against the Government and not against the individuals. So, since that was against individuals and not against the Government as I felt it could be corrected without going into any great, long litigation of attacking the Government.

Those defendants were in court for the first appearance and if it were against the Government they wouldn't have been there. They wouldn't have had to have been there and the argument by the opposing counsel was that it was against individuals and not the Government.

The case was dismissed on the grounds that I stated.

Now, your Honor, after the case had elapsed over the six months, as Judge Weinberger, if I remember correctly, stated, and if I remember correctly the opposing counsel stated after six months I could file suit.

And to show your Honor that I am right on this, the opposing counsel wanted to have the suit dismissed with prejudice and I objected to that and the Honorable Judge Weinberger ruled that I should be permitted in my capacity, in my capacities to have recourse in the Federal court and that, therefore, to dismiss it with prejudice would be depriving me of my rights and the honorable opposing counsel actually made the statement that he felt that perhaps there [29] was a question and I should have the right to file a suit later in the Federal court.

That is the sum and substance of the conversation at that time, your Honor.

Well, when the case was dismissed and enough time elapsed, I filed suit again in a court of law upon the ground that they claimed, the opposing

counsel, that I was operating under antiquated laws.

Well, I didn't know that the court of equity was antiquated, but assuming the fact that various judicial changes, might be in process and if it isn't or is in perfect order, while it may be good law but not the best, if there is a remedy at law I should not go into a court of equity.

It so happens, your Honor, that I studied the matter very thoroughly in my meager way and I found that under the constitutional law and statutory law I was 100 per cent right in my opinion and had been so held by my former attorneys that I have had and had it not been for the death of the last attorney, which was paid money to serve me individually, not the trust or not the other individual trustees, he would be here today instead of myself.

So, in filing that suit before I came up before the Honorable O'Connor's court, again which I was advised by Government men, mind you, to use these names to show [30] merely—to merely show the court that there were other trustees—the whole situation did not apply to me, and since the other Trustees are not injured, your Honor, in any way, shape, or form, the Trust itself is not injured in any way, shape, or form in one way, while in another way it is. Not being a lawyer I cannot represent it. William D. Noland personally is the injured man, whereby I as an individual am not responsible for business, legal and tax matters of other people

or other concerns, and the tax matter involved is setting out of the Dr. William D. Noland Trust Estate, Limited, to William D. Noland personally.

Might I digress one minute here by stating that Dr. William D. Noland Trust Estate, Limited, is a charitable institution and it specifically states so in the Trust and comes under the heading of the statute in the book that I have on the table—230 Charitable Institutions, and does not come under 167.

Now, the second suit that was brought was brought in a court of law against the United States Government and not against individuals, therefore the *res adjudicata* does not lie in this instance, because the first suit before the Honorable Judge Weinberger was in a court of equity against individuals and not the Government.

The second suit before the Honorable Judge O'Connor is against the United States Government and not [31] individuals.

Now, they make citations in regards that Westover was not in office at that time. Well, frankly, Roosevelt and Truman were not in office when the Monroe Doctrine was made, but nevertheless the United States does not abdicate. It is only his office that is being sued, which under the law of agency, is a department of Government, and that is the only way, according to law, statutory law, and according to the law of agency, to reach the United States Government—that is through its agents and a suit adverse to the Government does not affect those agents individually. It is in name only.

If the court pleases, I would like to use a comparison here. When you declare a State law unconstitutional you name the Attorney General and you have to use his name, but you certainly don't hold him responsible, and if it is knocked over, declared unconstitutional by a Federal court, he is not affected individually. He only represents and is symbolic of that State—the State law.

That is all these gentlemen in this suit are. They are symbolic and they represent the Government and if the decision is against them it is not individually affecting them. It is the Government.

Now, they state that he is not responsible since he wasn't in office. Under the law of agency he is responsible for that office. He is the United States [32] Government so to speak, the same as any previous documents in years and generations gone by that our forefathers set up in this land. We are all subject to it, and I think without any further explanation on that, your Honor, I think that clarifies my position there and shows, as I stated.

Now, if I may state on the statute here again, there is not one citation in all of their papers served on me that is in point in my own and personal opinion, and are not worth the paper they are written on because it is not in point and has nothing to do with this case.

They are coming in on 167 and so far, your Honor, I have not in my meager way, been able to bring them to trial.

I would like to have these issues brought up and if I am permitted to amend this Bill, which I beg this court to grant, I will say this, that this Bill will be so written that there will be no controversies in any way, shape or form on that, because I am eliminating a tremendous amount of material. I am even going to eliminate names so that they cannot come in here where I will have to argue and defend myself against.

As I stated in the proposed amendments, I am coming in on contracts, to see and have adjudicated whether or not contracts are valid in this case, for which the United States Government, as well as the State, held for many years [33] that this trust and the proceedings in which the Trustees were operating was 100 per cent legal.

From 1935, June 1st, until the spring of 1942, the Government, Internal Revenue Department held it as being fine, perfect—I was in order. The Trust was in order. The Trustees and everything else was in order. And an instance came up whereby the United States Assistant District Attorney, when he was here, Crawford, looked over the Trust and a document that I had written in behalf of it, and he declared it is one of the finest—"Doctor," he says, "I know old Judge Bull that wrote it," and he said, "Doctor, you had an angel, stick with it. You are doing great work."

Another instance that came up, your Honor, if you will permit me to state this—and I was down to the United States District Attorney's office and

an attorney down there—Attorney Walker looked over my Trust—I say, “my Trust”. I cannot say “their Trust” according to these attorneys, so therefore I have to say “my Trust” or “the Trust.”

In the presence of other Trustees, Attorney Downing and Attorney Walker, he stated: “Doctor, the Trust is 100 per cent perfect. Your document is 100 per cent perfect and one of the finest legal documents that we have ever read.” He said, “Doctor, who wrote that?” And [34] I said, “I wrote it—compiled it from the authorities and the teachings of Judge Bull.”

I said, “But you gentlemen, now, you are the United States District Attorneys. I want to ask you a question and here is why I have come to you,” and I read them the authorities and I said, “Is there any possible way of ever having this adjudicated?” And these are the words of Attorney Downing. I will not quote it just the way he said it, but in substance he meant this—he used a word there that would not be best to use here. He said, “Doctor, fight it until the end of time. You are right, and remember this, that we are living in the United States of America where the Constitution is still in operation, and don’t give up. Continue to fight.”

Those are the words of Mr. Downing, and almost in identical words of Attorney Walker. They told me that and shook hands with me and they said, “Promise us, Doctor, that you are not going to acquiesce and you are not going to go down in de-

feat and not stand for your rights, because you are 100 per cent legally right.”

That is the District Attorney’s office right in this building, your Honor.

Now, in the motion to amend this Bill—I will not read you the proposed proposals to amend—I will not take your time. You have it before you. I shall not read [35] it unless you want me to.

The Court: You may do so.

Dr. Noland: I will start with the body of it:

“Comes now William D. Noland, Trustee, representing his interest only as a trustee in above benevolent trust estate, and William D. Noland, personally representing his personal interest in above action, and proposals to amend bill of complaint as follows:

“1. By mistake and error names of other trustees were mentioned as shown above merely to show that there were more than one trustee, and bill should be corrected by omitting said names in amendment.

“2. That prayer in bill for judgment be amended so that court may determine two contracts whether valid or invalid, made by William D. Noland as trustee, and William D. Noland, personal, with the said benevolent trust estate, as a trustee and for personal service.

“These proposals are supported by motion to amend and affidavit on file.”

And here is the affidavit supporting the proposals to amend:

“William D. Noland, Trustee, and William D. Noland, personal, complainants in propria persona, being [36] first duly sworn, deposes and says: That he is representing no one outside of himself as a trustee and personal as both his trustee interest and personal interest are involved in above action, therefore he is not practicing law representing anyone else, and contends he has a right to represent his trustee interest and personal interest in above matter, and that he has not been able to procure counsel on account of not having sufficient funds or money to pay the required fees requested by any counsel which he has interviewed for the purpose of acting as counsel in the above matter, therefore the complaint needs corrections and should be amended.”

And that is signed by William D. Noland, Trustee in propria persona and William D. Noland, personal, in propria persona, and sworn to before a notary public.

Now, your Honor, just one statement to clarify the position here. It seems as I go over my bill of complaint that I have so much in here because in covering the matter and covering the contents and the involvements I had to show the trustee part of the picture to apply to me personally, because the two and one is the same thing as far as the legal aspects are concerned. When I come in as a personal individual to show that I am not responsible, the way they are putting it, I have to, according to law, [37] bring in the other party to show the pic-

ture of the contract which is one and the same person. The other two trustees were not involved. They did not set anything out to them.

The Court: May I interrupt you? What is your specific prayer and what is the relief that you are seeking in this case? Let me hear you on that.

Dr. Noland: You mean in the amended bill of complaint?

The Court: Yes, the one that is now before the court. In other words, are you seeking relief as to your own self and not the trustees of this benevolent estate? I want you to explain that to me.

Dr. Noland: Yes, sir.

“Wherefore, complainants pray for process and judgment as follows:

“1. That Section 167 of the Federal Internal Revenue Code does not apply to the aforesaid benevolent trust estate, namely, Dr. William D. Noland Trust Estate, Ltd., and that any attempt to apply or make application of said Section 167 to said benevolent trust estate is null and void of no effect whatsoever.”

May I digress?

The Court: Certainly.

Dr. Noland: I had to bring that in to show that they could not set everything from the trust to me personal. Now, paragraph 2. [38]

“That as a benevolent trust estate, the trustees for said benevolent trust estate do not have to file any income tax return and that the said trustees do

not owe the Internal Revenue Service or its Agents any taxes of any kind whatsoever.”

Attorney Tandro said it had to be put in that way to “make it stick” as he called it. Now the rest of the prayer:

“That since William D. Noland personally has contracted to give his skill, knowledge and labor to the aforesaid benevolent trust estate for the benefit of the beneficiaries of said benevolent trust estate without profit, salary or wages, that his personal living expenses are paid from the funds of the said benevolent trust estate by the trustees as benevolent trust estate expense, he owes no income tax now nor any of the amounts which have been charged to him as taxes or additional taxes by the aforesaid Internal Revenue Agents transferring, assigning and delivering assets, funds and property from the said benevolent trust estate to the personal account of William D. Noland personally, as his expenses are paid as benevolent trust estate expense by the trustees for said benevolent trust estate.

“4. That the aforesaid Internal Revenue Agents [39] and Service be ordered to return with interest all the monies paid to said Agents and Service as income taxes, because the aforesaid benevolent trust estate is a charitable organization and any and all monies paid for income taxes have been paid in error by the trustees for said charitable organization and said monies should be returned to said benevolent trust estate.

“Wherefore, complainants pray for such other

order, orders, aid and relief as the court may deem just and proper in the premises.”

And if I may add this, your Honor. Two weeks ago it was my understanding in conversation with Attorney Bryant in Judge O'Connor's court, that they would not object to my amending the Bill, but he did want me to serve on them the proposed amendments.

The Court: Was that stated in open court?

Dr. Noland: Not in open court. It was stated in the courtroom. It was stated in Judge O'Connor's courtroom that they had no objection to my amending the Bill, but they wanted the proposed amendments served upon them.

Well, I didn't know that you had to serve them only if they were required, and that is the way I understood it—that they required it, so I served them. I was in the corridor with Attorney Oakes and he made the statement emphatically that he had no objection personally to me [40] amending the Bill and the superiors—his superiors had instructed him to not oppose it and to permit me to amend the Bill; all that he wanted was the proposed amendments. Now, those were statements, your Honor, and a party overheard both statements, and I beg of the court to grant the privilege to amend the Bill.

The Court: Under this prayer what specific relief are you personally seeking? What amount of money or anything of that kind do you want? I want to get your idea of this prayer.

Dr. Noland: Well, the amount of money, your Honor, is very minute so to speak.

The Court: Just the two small items?

Dr. Noland: Yes; the amount of money was only brought in due to the fact that if I didn't bring in the amount of money the opposing counsel would come in with some technicality of law that only a Philadelphia lawyer would know how to look up and I wouldn't know as a layman, and try to get my case thrown out upon the ground of money and this, that and the other thing; and if my amended Bill, if I am granted permission to amend the Bill, I am telling your Honor the money question is going to be left out. I am going to amend the Bill merely upon contracts as stated.

The Court: Who will get relief under your amendment?

Dr. Noland: The relief on my amendment would go to [41] William D. Noland personally.

The Court: And what would be that relief?

Dr. Noland: Where the funds and proceeds of the Dr. William D. Noland Trust Estate would not be set out to me personally to pay taxes on.

The Court: And you claim they assessed those funds against you personally?

Dr. Noland: Yes. If I may state this to explain matters, they made the statement that \$10,000 or \$15,000 a year is taken in. That is a lot of money from a standpoint of just an ordinary salary. Your Honor, that is absolutely no money at all in the work in which we do because the money is used—for instance, there is \$1,000 taken in. There is a

poor individual, a helpless case, some poor old woman or man or child and they have no money. You cannot get them on State relief, Federal relief, or otherwise. Those cases have never been turned away from the door of Dr. William D. Noland Trust Estate, Limited. If those patients need service it is given to them. If certain services outside of my particular meager skill is needed that service is paid for out of the Dr. William D. Noland Trust Estate, Limited, for those poor people. If they need hospitalization and surgery and they cannot afford it and cannot pay one dime, that is paid for.

Now, they are setting out all of that money, your [42] Honor, that those poor helpless men, women and children have benefited by for me to pay taxes on.

I did not get the money. They even set out, your Honor, I might state this—that Hayward apologized for doing it, and said he was under orders. He said, “Doctor, I hate to do this. I will lose my job if I don’t.”

I am only stating that, your Honor, to show the true facts. He set out laboratory fees and said that I benefited one-third from that. Laboratory fees, X-ray pictures. They paid the laboratory themselves and other laboratory fees which every book and record was kept where it was paid for them.

There is one case in particular, a Mr. Brown, that was sent to the Wilshire Hospital. Dr. Robbins overseen the operation and everything. The hospital bill was paid by the Dr. William D. Noland Trust Estate, Limited. The doctor’s fees and every-

thing else was paid. It so happens the Schaefer Ambulance Company donated their services. They set that one-third out, your Honor, to me personally that I paid taxes on.

Do I make myself clear?

The Court: I understand your contention, but there is another question raised here, and that is the statute of limitations. They state that this action was not brought within the three-year statute. What is your view on that? [43]

Dr. Noland: Well, that was the—I think the honorable attorneys here referred to that filing of claims for money. If I am not mistaken that is what they stated, isn't it, your Honor—filing for a refund?

The Court: Within the three-year limitation.

Dr. Noland: Yes. That has nothing to do with the statutory limitation of filing a suit. However, the claims that I did file, your Honor, their statement is erroneous on that. They made a mistake in making the statement.

The Court: Do you in your complaint explain that?

Dr. Noland: Everything is explained.

The Court: As to what was done so that it was taken out of the three-year statute?

Dr. Noland: Well, I was not outlawed on that, your Honor. They made a mistake on making that statement. I was not outlawed from a statutory limitation. The claims that were filed in good order—

The Court: Did you file within the time allowed by statute? Counsel is urging that you did not. I am just trying to get your views as to that.

Dr. Noland: They were filed within the claim.

The Court: Within the three years?

Dr. Noland: Yes. Now, after the claims have been filed once and it is thrown out you cannot file again and go [44] on those particular claims. Now, that is where the honorable counsel here is attempting to confuse this court. It is only mentioned in here merely to show the entire picture—the truth of the entire works and therefore they are bringing in that it has been over three years since those claims were filed. Certainly, but that has nothing to do with the claims, the claims that were filed and thrown out as I explained further, because there were two different titles got before the tax court. They had no business doing that. But they did it purposely. It is a trick in law to get you thrown out. Had I done it the tax court would have, perhaps, held me in contempt—maybe not as a layman, I don't know, but then, your Honor, those claims are only mentioned through here and it would not make any difference.

The Court: When do you think the three-year statute ran against this action? When do you think it commenced, if it did?

Dr. Noland: Against this action?

The Court: Yes.

Dr. Noland: It can't commence—couldn't commence in 25 years because it is not even applied to

this action, your Honor.

The Court: It doesn't apply here?

Dr. Noland: No. Those claims that they are speaking [45] about have no connection with this lawsuit. In other words, your Honor—

The Court: What I am trying to get at is your view as to the bringing of this action for your own personal relief and not for the relief of the trustees or the estate. Now, does the three-year statute run against you? When does it commence, if it does, against your personal relief?

Dr. Noland: Well, the three-year statute of limitation commences after I have been notified of the tax.

The Court: Has that been within three years?

Dr. Noland: Some of it has, yes, but I haven't filed those. I haven't even asked for any of the—what they are claiming that the statutory limitation runs against—that has not been filed, your Honor.

The Court: Have you filed for your own personal relief?

Dr. Noland: No. I just ignored it. I forgot it. I haven't filed for that relief and I haven't mentioned in here why I didn't go about it, why I didn't try to get any money back, even though it was paid, but that was because my health will not permit it and that is why I didn't, your Honor.

The Court: You know the purpose of the statute of limitations? It means you must bring a suit within a certain time or it is outlawed. [46]

Now, I am trying to get your view as to when you think the three-year statute ran against you.

You are suing here for your own individual benefit. Now, when should you act to keep that statute from running against you? Have you done anything, or should you have done anything within three years so the statute would not apply? The other side makes the general statement that the action is barred by the statute of limitations.

Dr. Noland: The statute of limitations has not run against me in filing this suit.

The Court: I know you say that, but counsel says it has. I am trying to get your specific views.

Dr. Noland: For the simple reason, taking their own argument—I continue to get letters, threatening letters, even since this has been filed—since 7315-O'C has been filed. I am still getting statements and demands from the United States Government. I am still getting demands from departments of the Government that are named in this suit—since this suit has been filed.

The Court: Does that appear in your pleadings so the court can rule on it?

Dr. Noland: No; I couldn't put that in, your Honor, because I received it afterwards, but it shows in my pleadings here.

The Court: That is what I am trying to get at.

Dr. Noland: My pleadings show here the entire setup and where the statute of limitations does not run against me.

The Court: Do your pleadings show the Government or defendants are still considering your claim?

Dr. Noland: Oh, yes.

The Court: That they haven't completed it and given you a final ruling?

Dr. Noland: Yes.

The Court: Do your pleadings show that?

Dr. Noland: That is right, your Honor.

The Court: Will you point out in your amended complaint some allegation to show it is still continuing, the controversy and that the statute has not run against you?

I am going to recess in about ten minutes for the noon recess and continue the case until two o'clock, and in the meantime you can look into that.

Dr. Noland: Here is one:

"The aforesaid letter of Defendant George D. Martin, Internal Revenue Agent in Charge, dated January 26th, 1945, and aforesaid statement signed by John H. Cramer, Internal Revenue Agent, dated November 3rd, 1944, and attached to said letter dated January 26th, 1945

* * * * *

That alone—

The Court: When was this action filed?

Dr. Noland: This action, the first action was filed—

The Court: The first complaint?

Mr. Bryant: Will your Honor pardon me, please?

The Court: Let me hear him.

Mr. Bryant: I have to be in Judge O'Connor's court. Would your Honor excuse me?

The Court: Certainly. I understand counsel here is attending to it.

Dr. Noland: September 15th, 1947.

The Court: So you are within the three years from the date of that?

Dr. Noland: Yes, I am within three years.

The Court: What does that letter relate to? Does it show that you are still having a controversy there?

Dr. Noland: Yes.

The Court: What is it? Just call my attention to it. You have made it a part of your pleadings.

Dr. Noland: I think the letter is an exhibit, your Honor. It is mentioned here and then comes in as an exhibit.

The Court: Are there any others? I will look into that.

Dr. Noland: That is on page 6. [49]

The Court: We are going to adjourn in a few minutes for the noon recess and you may look up your pleadings, your amended complaint as to just what I am trying to get at, and that is whether there is any date in the three years which shows you are still having a controversy over this claim with the defendants.

Dr. Noland: I can do that, your Honor. I paid particular attention and notice to that when I wrote it, that I was in my three-year period.

The Court: Have you finished, Doctor? I don't want to cut you off.

Dr. Noland: The only thing I will say is this, your Honor, the dates are very simple. They are right in here. It shows there has been a controversy during the three years.

The Court: Is there anything else you want to say?

Dr. Noland: I just beg the court to grant me leave to amend because my house is in order and anything that they have said against this is not even one iota in point to it. There is nothing but individuals and corporations referred to. There is not one citation that they have brought in as to a charitable institution or charity work. They say they stand on 167 and I simply cannot get them to bring that issue before the United States Federal Court, but if I am permitted to amend the Bill I am going to say this, [50] your Honor, that it will be an utter impossibility for them to evade it the next time. Thank you.

The Court: Mr. Oakes.

Mr. Oakes: On this subject of amending, if the court please, suit was brought in the case before Judge Weinberger—and I would have to verify this from my file, but I am fairly certain that there was some amended complaint in that action, and then of course this action, as I see it, is largely a repetition.

The Court: They have amended once, you say?

Mr. Oakes: Yes, 5716.

The Court: In this suit?

Mr. Oakes: Yes. Now, getting to this suit.

The Court: How many times has there been an amendment in this suit?

Mr. Oakes: I am sure they amended last fall.

The Court: Amended it once?

Mr. Oakes: Amended once. And then, I think

it was two weeks from yesterday, we were before Judge O'Connor and then the question came up.

The Court: The same one you have here now?

Mr. Oakes: This case that your Honor has came up two weeks ago before Judge O'Connor on the question of amending. Well, we couldn't visualize what the amendment [51] would be.

The Court: Of course you wouldn't know until it was served upon you.

Mr. Oakes: And we didn't know what it was, so Mr. Bryant and I stated that it would be a good idea if we were furnished with a copy of the amendment and Dr. Noland, within the proper time, furnished us with these Proposals to Amend the Bill of Complaint.

The Court: And he specifies there how he wants to amend?

Mr. Oakes: He has read them into the record.

The Court: And did he serve that on you two weeks ago?

Mr. Oakes: Received by the United States Attorney on March 19, 1948, and at this time I don't think the Government need object to those proposals. In fact, I think your Honor can consider the complaint amended by these proposals.

The Court: Very well, let the record show there is no objection to the proposals of the plaintiff to amend, and it will be so amended.

Now, the case is before the court on the amendment and the complaint as amended, and that proceeding has not been objected to.

Mr. Oakes: I agree that he can make the amendment as stated in these proposals to amend the Bill of Complaint which were served on the United States Attorney on March [52] 19th, 1948.

The Court: And that is the amendment you want to make?

Dr. Noland: Yes, the ones I served on them.

The Court: Very well, let the record show the amendments are allowed because you both agree to it.

Mr. Oakes: Now, as I intimated before on that amendment, and I would like to have our motion stand—I would like to have our motion as made stand with reference to the amended complaint also if that is agreeable to the court.

The Court: Yes.

Mr. Oakes: As recently amended.

The Court: Certainly.

Mr. Oakes: Then I guess that disposes of all the questions with regard to amending the complaint, and it is now under submission to your Honor, as far as the Government is concerned.

The Court: Very well. Plaintiff has stated his position as to whether the three-year statute has run against him. What have you to say about that?

Mr. Oakes: Well, I cited the law on that.

The Court: As the complaint stands amended.

Mr. Oakes: The law is contained in Section 3772, Internal Revenue Code, and that says:

“No suit or proceeding shall be maintained [53] in any court for the recovery of Internal Revenue tax alleged to have been erroneously

or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.”

So, the prerequisite to the suit is the filing of the claim for refund.

Then we have to refer to Section 322(b) (1), Internal Revenue Code, and that provides the three-year limitation.

The Court: According to the plaintiff during those three years the controversy was still in existence and continuing. What do you say as to that?

Mr. Oakes: Well, the statute says—

The Court: I know the statute generally fixes the time in which you have to bring a suit, but he is saying and his complaint shows that there is still a controversy over the refund between the defendants and the plaintiffs within the three-year period.

Mr. Oakes: Well, the controversy, I think, is [55] immaterial, your Honor.

The Court: There is not only a controversy, but he says they are still considering his contention which he had before the defendants and the Government.

Mr. Oakes: Well, let me put it this way. I will quote from my memorandum. Exhibit I to the

amended complaint shows an alleged claim for refund filed March 15th, 1946, with respect to a payment of \$80.45 for the year 1937, made on July 6th, 1942.

So, according to his own figures, he made the payment in July of 1942, and according to his own figures he did not file his claim until March 1946. That has to be more than three years.

The Court: Between 1942 and 1946 is your contention?

Mr. Oakes: Absolutely. The payment was made in 1942 and he waited until 1945, March 15th, 1946, rather, to file a claim. So, no matter how many contentions or arguments or controversies there were, there was no claim as to that filed within three years after the payment on July 6th, 1942.

Now, the other one he didn't give us a specific date. He said that his refund claim was filed March 15th, 1946, and he said the payments were on or before March 15th, 1943. So, possibly, that claim might be within the three years, but the other one is clearly over three years. However, [56] it is only a \$35.00 item.

The Court: It doesn't make any difference if it is only a dollar. It isn't a question of the amount.

Mr. Oakes: We have set out eight different grounds as to why this suit hasn't been properly brought—*res adjudicata* and all the other arguments.

The Court: You have heard his argument as to why he says *res adjudicata* does not apply, and so forth.

Mr. Oakes: In his argument I think your Honor put your finger on the essence of this by stating: "Well, now, what is the prayer for relief?"

Paragraph 1 wants the court to make an adjudication on Section No. 167.

Well, that is declaratory relief. And then Paragraph 2 wants an adjudication that the trust estate does not have to file a tax return. Well, that is purely declaratory relief.

Paragraph 3 also wants an adjudication as to these earnings. More declaratory relief, which is prohibited by Section 274(d) of the Judicial Code.

Then your Honor wanted to know whether this relief was for the doctor personally or for the trust estate. And you wanted to know about the prayer for relief and he quoted Paragraph 4 of his own prayer for relief and in that he prays: [57]

"That the aforesaid Internal Revenue Agents and Service be ordered to return with interest all the moneys paid to said agents and service as income taxes, because the aforesaid benevolent trust estate is a charitable organization and any and all moneys paid for income taxes have been paid in error by the trustees for said charitable organization and said moneys should be returned to said benevolent trust estate."

So, under his own prayer he says the trustees paid it, but it should be returned to the trust; so there again he is asking for relief for the trust and not for himself; and he can't represent the trust

because they have an adverse interest and he can't bring in the other trustees.

Now, I simply cannot keep up with all this narrative that the doctor has gone into. He has been very active. He has had this up before the tax court in Washington and with various individuals and agencies and United States Attorneys. I don't know about those conversations. I just merely think they are immaterial, but I do want to say that on the judgment entered by Judge Weinberger it speaks for itself, and it isn't to be interpreted in accordance with the understanding by the doctor. And I only want to add that under the Federal Rules of Civil Procedure— [58]

The Court: Did Judge Weinberger make findings and issue a decree in that case?

Mr. Oakes: He gave a judgment which I quoted in full, your Honor, and that stated why he was making the ruling.

The Court: Suppose you gentlemen return at two o'clock and we will go into that a little more. We haven't time now.

Any other matters that you want to look up during the recess you may do so. We will adjourn now until two o'clock.

(Whereupon, at 12:00 o'clock noon a recess was had in the above entitled matter until two o'clock p.m. of the same day.) [59]

Los Angeles, California,

Tuesday, March 30th, 1948—2:00 p.m.

The Court: You may proceed.

The Clerk: If your Honor please, counsel for the defendants has not arrived.

The Court: You may proceed. Counsel for the defendant should be here. Go right ahead.

Dr. Noland: Your Honor, it seems to be a contention of the defendants that I did not file the suit within the three-year period after receiving communications from the Government.

I have the papers here and the letters and also the file.

The Court: What I am trying to get at is this. Are they a part of your complaint?

Dr. Noland: Yes, they are a part of my complaint.

The Court: I have to decide this case on the record that is before me.

Dr. Noland: It is in the complaint.

The Court: I am trying to get the record clear in my mind. Have you filed a trial brief?

Dr. Noland: Yes.

The Court: I haven't seen it. Will you point it out to me in your trial brief?

Dr. Noland: That is Exhibit C.

The Clerk: What date was it filed? [60]

Dr. Noland: I received this letter December 14th, 1944.

The Court: What does the letter say?

Dr. Noland: Shall I read it?

The Court: Is it attached to your complaint?

Dr. Noland: Yes.

The Court: What was the date of the letter?

Dr. Noland: It was mailed to me on December 14th, 1944.

The Court: And reached you when?

Dr. Noland: It either reached me the same day or the following day.

The Court: All right.

Dr. Noland: Shall I read you the contents of the letter?

The Court: Yes.

Dr. Noland: It is addressed to Dr. William D. Noland, 3944 Wilshire Boulevard, Los Angeles, California. The letter reads:

“Dear Dr. Noland:

“An office audit of your income tax return for the year 1943 has resulted in a deficiency of tax and penalty in the amount of \$1,114.86. The explanation of the changes causing this deficiency and the re-computation of the tax are shown in the [61] accompanying statement.

“If you are in agreement with the adjustments, the enclosed form 870 should be executed and returned to this office within ten days in order to expedite the closing of your case and thereby stopping the accumulation of interest.

“Payment of the additional tax due, plus statutory interest computed from the due date of the first installment to date of payment, should not be made until notice and demand is received from the Collector of Internal Revenue in your district.

“Any correspondence which you desire to submit in connection with the above should refer to Internal Revenue Agent J. F. Fraser.”

And that is signed, "Very truly your, George D. Martin, Internal Revenue Agent in Charge."

Then on December 29th, 1945, I received another letter. That is under Exhibit F.

The Court: What is that?

Dr. Noland: It is a letter dated December 29th, 1945, on their letterhead, and it is addressed to Mr. William D. Noland, 3944 Wilshire Boulevard, Los Angeles 5, California. It reads:

"Dear Mr. Noland:

"You are advised that the determination of your [62] income and Victory Tax liability for the taxable year ended December 31, 1943, discloses a deficiency of \$1,245.13, and \$62.26 in penalty, as shown in the statement attached.

"In accordance with the provisions of existing Internal Revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

"Within 90 days (not counting Sunday or a legal holiday in the District of Columbia, as the 90th day) from the date of the mailing of this letter, you may file a petition with the tax court of the United States, at its principle address, Washington, D. C., for a re-determination of the deficiency or deficiencies.

"Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of A:CONF. The signing and filing of this form will expedite the closing of your return by permitting an early

assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.” [63]

And that is signed, “Very truly yours, Joseph D. Nunan, Jr.”

Then on August 26th, 1945, I got another one. I didn't mark it as an exhibit. I overlooked that one. This is dated January 26th, 1945. It is addressed to Dr. William D. Noland, Trust Estate, Limited, 3944 Wilshire Boulevard, Los Angeles, California. And then:

“Dear Dr. Noland:

“I enclose a copy of the report of the examination of your income tax return—”

If your Honor will permit me to make an explanation here.

The Court: Yes, I guess so. Go ahead.

Dr. Noland: I would first receive a letter in the name of the Trust Estate advising me of the indebtedness, and then I would receive it in my own personal name, setting forth the indebtedness to me. That is why I had to write my bill in the way I did.

And this is the letter:

“I enclose a copy of the report of the examination of your income tax return for the year 1943.

“After consideration by this office the following adjustment of your tax liability appears to be warranted for the reasons stated in the report. [64]

The additional tax for the year 1943 is \$1,061.77. Penalty, \$53.09. Total additional tax and penalty, \$1,114.86.

“If you agree to this adjustment the enclosed form of waiver should be executed and forwarded to this office promptly, in order to permit the early assessment of the additional tax and penalties and to stop the accumulation of interest. Such interest will cease 30 days after the receipt of the executed form or upon the payment of the additional tax and penalties to the Collector, whichever occurs first.

“If you desire to make immediate payment of the additional tax and penalties without awaiting assessment you should forward your remittance to the Collector of Internal Revenue at Los Angeles 12, California, enclosing this letter or a copy thereof.

“Interest on the additional tax should be included in your remittance computed at the rate of six per cent per annum from the due date of the first installment to the date of payment.

“If you do not agree to the adjustment of tax and the penalties proposed you may file a protest, executed in triplicate under oath, with [65] this office within 30 days from the date of this letter, stating the grounds for your exceptions.

“Any protest so filed will have careful consideration and if you so request an opportunity for a hearing in this office it will be granted you prior to the final determination of any deficiency against you.

“This letter is not a final notice of deficiency and this office will be pleased to answer any questions which may occur to you in your examination of the enclosed copy of the report.

“If you should fail to pay the additional tax and penalties to the Collector of Internal Revenue or to file with this office within the 30-day period mentioned, either a waiver or the enclosed form or a written protest, final determination of your tax and penalty liability will be made and notice of deficiency will be sent you in accordance with the provisions of law applicable to the assessment and collection of income and profit tax deficiency.

“Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.”

That is signed, “Respectfully yours, George D. Martin.” [66]

The Court: You need not read all of them. I will have to check into them.

Dr. Noland: Your Honor, my contention is that my suit is in order. Opposing counsel contends that the statutory limitation invoked in this case—I think your Honor can see that this suit was filed before the three-year statutory limitation period. I was very careful in checking that before even I filed the suit. And I appreciate and beg this court to deny their motion and grant leave to amend.

The Court: They have conceded that you can have your amendment. That is all conceded.

Dr. Noland: Thank you.

Mr. Oakes: I won't take much more of the court's time because we have gone into it very thoroughly during the forenoon session.

I do just want to state that under the judgment by Judge Weinberger, and it was dated January 9th, 1947, and it was entered and I have quoted it in our motion on behalf of the Internal Revenue Agents.

Obviously the judgment speaks for itself and the interpretations by the parties would not be controlling. The essence of the order, one of the grounds that was under consideration, was that the above action, not only with respect to the injunctive relief therein prayed, but also [67] as to all the other aspects and in its entirety is hereby dismissed as to the above four defendants, on the ground that the complaint herein filed fails to state a claim upon which relief as prayed for in the complaint or any other relief can be granted against said four defendants or any of them.

And therefore Judge Weinberger thus used sweeping language to hold that these various grounds of relief which were presented to him and which are now again presented to your Honor, did not constitute a cause of action or any facts upon which relief could be granted.

There was some discussion by Dr. Noland as to his claim that this prior judgment wasn't binding on him. He stated that it would not be binding because it did not contain any recital that it was entered with prejudice.

So in that connection the whole argument can be disposed of by a reference to the rules of Civil Procedure. Rule 41(b) covers the subject and it states:

“Involuntary dismissal. Effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court a defendant may move for dismissal of an action or of any claim against him after the plaintiff has completed the presentation of his evidence. The defendant without waiving his right to offer [68] evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief unless the court in its order for dismissal otherwise specifies a dismissal under this subdivision and any dismissal not provided for in this rule.”

Now, that is the kind of dismissal Judge Weinberger entered—a dismissal other than a dismissal for lack of jurisdiction or improper venue operates as an adjudication upon the merits. And therefore since the rules so provide we contend that we had an adjudication upon the merits before Judge Weinberger and if that doesn't have the effect of *res adjudicata* I cannot see any limitation whatsoever on the doctor's right to bring suits for evermore. I think the issues were settled before and that is only one of the eight grounds, any one of which I believe are adequate to support our motions.

The Court: What was the title of the action

before Judge Weinberger? Was it the same as the title here?

Mr. Oakes: The title of the action before Judge Weinberger was exactly the same as to the complainants. It involved William D. Noland individually and it also involved this same trust and the same three trustees.

The Court: I mean the title. [69]

Mr. Oakes: It is identical as far as the complainants are concerned. Now, as to the defendants, there was this variation. In that case the doctor sued the Commissioner of Internal Revenue himself and also four Internal Revenue Agents, and the Commissioner of Internal Revenue in Washington, D. C. It was conceded by Dr. Noland that the suit should not have been brought against the Commissioner of Internal Revenue out here in Los Angeles, so that eliminated the Commissioner.

But we still had remaining in that prior action the same four Internal Revenue Agents who are now being sued in this action.

He sues the Collector and four agents, and in the prior action he sued the Commissioner and the same four agents.

So, the Government having prepared its motions and memoranda of supporting authorities in considerable detail, I would like to have it submitted so your Honor can study this voluminous file, including all the authorities cited by both sides.

The Court: Well, I will take the matter under submission.

(Whereupon, at 2:30 o'clock p.m., a recess was had until 10:30 o'clock a.m., of the following day, Wednesday, March 31, 1948.) [70]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of May, A.D. 1948.

/s/ J. D. AMBROSE,
Official Reporter.

[Endorsed]: Filed May 25, 1948.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
April 19, 1948

The Court: I want to dispose of a matter that has been submitted for decision. It is case No. 7315, Noland and others against the Collector of Internal Revenue and certain agents of the Government.

The case is before the court on motions for summary judgments of the defendant and the dismissal of the action on the ground, first, that the complainants are precluded from bringing the instant action against defendants on the principle of *res adjudicata* as the complainants are the same complainants who brought the action in this court in Case No. 5716-W on January 9, 1947, in which the action was dismissed and was a case where the complainants sought relief of a refund of the same tax payments as are included in the instant case, and a prayer for relief in the former action which related to the instant subject matter.

That case was first brought by William D. Noland, H. K. Miller, and Harry R. Maxwell, Trustees of the Dr. William D. Noland Trust Estate, Limited, a beneficial trust estate, and William D. Noland versus George D. Martin, Internal Revenue Agent, and other agents.

The complaint was filed on August 26th, 1946, and judgment of dismissal was signed on January 9, 1947.

The first action was in *propria persona*. The [73] prayer was for relief in eight matters. First, that a temporary restraining order be issued restraining defendants from molesting or interfering with plaintiffs or with interfering in any transfer of property pending determination of the case.

Second, that an order to show cause be issued as to why such restraining order should not be issued.

Third, that a temporary injunction be issued to the same effect.

Fourth, that a permanent injunction be issued.

Fifth, that defendants be ordered to return \$80.45—\$210.00 with interest which was paid by plaintiff Noland personally as a result of assigning income to the account of Noland personally from the account of Noland, Trustee, all of which was unlawful.

Sixth, that plaintiff be given \$50.00 damages for fraud as a result of wrongful transfer effected by defendants, and mental anguish, et cetera, caused thereby.

Seventh, that the transfer of funds, assets and property to the personal account of Noland from the Trust be declared null and void.

Eighth, that plaintiff be awarded attorney fees, if one is employed, and for costs.

In a separate order of dismissal the court dismissed as to the defendant Newman for lack of jurisdiction due [74] to **improper venue**.

The court dismissed as to the other defendants and issued judgment on several grounds:

First, that **injunctive relief be denied on the** ground that no cause of action was stated upon which such relief could be granted. That it does not appear that any irreparable injury will result from the failure to grant **injunctive relief**. That there is an adequate remedy at law.

Second, that the action is dismissed not only as to injunctive relief but in its entirety since plaintiffs have failed to state a cause of action on which any relief can be granted.

Third, the defendants be awarded costs.

The instant action was filed on July 7, 1947.

The amended complaint is brought by the same parties plaintiff and the same parties defendant with two exceptions. The defendant Newman is omitted and the defendant Harry C. Westover, Collector of Internal Revenue, has been added.

The court granted a motion permitting the eliminating and adding of these names.

The prayer of the amended complaint in the instant action is as follows:

First, that Section 167 of the Federal Internal Revenue Code does not apply to the aforesaid benevolent trust estate, namely, Dr. William D. Noland Trust Estate, Limited, and that any attempt to apply or make application of said Section 167 to said benevolent trust estate is null and void and of no effect whatsoever.

Second, that as a benevolent trust estate the trustees do not have to file an income tax return and that no taxes are due.

Third, that since William D. Noland personally has contracted to give his personal services to the trust estate without profit that the trust estate is properly paying the living expenses of Dr. Noland and that Dr. Noland owes no taxes.

Fourth, that all monies paid by defendants be refunded with interest.

This contention of the defendants is sustained by the record in both cases.

It is further contended that the present Collector

cannot be held liable for acts before he commenced his duties and the alleged refund relied upon was before that time. That principle is recognized by the Supreme Court in a decision in 257 U. S., page 1, and in another decision in 314 U. S., page 186.

It is urged by the defendants that the present action is barred by the statute of limitations. [76]

Section 372 (i.c.) provides in substance that no action for refund shall be brought in any court until a claim for refund has been filed with the Commissioner according to the provisions of law pertaining thereto, nor shall any action be maintained less than six months after the filing of the claim for refund or more than two years after a notice of disallowance has been sent to the taxpayer. It is further provided, in substance, that a claim for refund must be filed within three years from the time when the return was filed or within two years from the time the tax was paid, whichever is later.

Page 1 of Exhibit 1 of the amended complaint shows that an alleged claim for refund was filed for \$80.45 on March 15th, 1946, for a payment made on July 6th, 1942, for the taxable year of 1937. Thus, it appears in regard to this alleged claim for refund, that this claim was barred by the three-year period when filed.

The only other refund claimed is that set forth at page 3 of Exhibit 1 of the amended complaint.

This claim purports to have been filed March 15th, 1946, and it is stated that the date of pay-

ment was on or before March 15th, 1943. This second claim was for \$35.64 and defendant contends that plaintiffs have failed to show that the claims were filed within the statutory period. [77]

It is contended that tax monies as to refunds sought were paid by the trustees and it is there prayed that the refund should be made to the said benevolent trust estate and the trust estate is seeking refund for itself; that the suit should be prosecuted by the trustees rather than by William D. Noland as an individual, although he is claiming now that the refund is due him on his individual account.

It is the conclusion of the court under the record now before the court that the complainants are not entitled to the relief prayed for. Therefore, the motion for summary judgment of the defendant is sustained with costs.

No findings of facts is now required under the new rules on motions for summary judgment, so the defendants are directed to prepare and present a form of decree by next Thursday.

(Whereupon, the above entitled proceedings were concluded.) [78]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and

correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of May, A.D. 1948.

/s/ J. D. AMBROSE,
Official Reporter.

[Endorsed]: Filed May 25, 1948.

[Endorsed]: No. 11978. United States Court of Appeals for the Ninth Circuit. William D. Noland, Trustee, and William D. Noland, Personal, Appellant, vs. Harry C. Westover, Collector, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division, et al., Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed July 16, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

Civil Action—No. 11978

WILLIAM D. NOLAND, Trustee, Dr. William D.
Noland Trust Estate, Ltd., a Benevolent Trust
Estate, and WILLIAM D. NOLAND, Personal,
Appellants,

vs.

HARRY C. WESTOVER, Collector, United States
Treasury Department, Internal Revenue Serv-
ice, Sixth Collection District of California, Los
Angeles Division, et al., etc.,

Appellees.

STATEMENT OF POINTS

Claims of Appellants, William D. Noland, Trustee, and William D. Noland, Personal, in submitting statement of points, are as follows:

Point 1.

That the appellant William D. Noland, Trustee, is representing his interest in a contract under which the Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, a charitable organization, is established, organized by a contract by and between the trustees, and the appellant William D. Noland, Trustee, is a party to the said contract, and the said contract under which the said charitable organization is established provides it is to be administered by natural person trustees in a joint tenancy, holding in trust as to distribution of avails. acting under citizenship, common law rights of contract, and constitutional rights, federal laws

and immunities vouchsafed to all persons, as set forth and provided in and by the Constitution of the United States of America, and so organized on June 1, 1935, with a board of trustees and numerous beneficiaries who are poor people and poor children who are unable to pay for health service when they are ill and afflicted with illness of any kind. And the District Court below in making and entering summary judgments against the second amended bill of complaint is a denial of due process of law and a denial of constitutional rights of appellants.

Point 2.

The District Court below granted motions for summary judgments and dismissed the second amended bill of complaint, and the record shows that the aforesaid Federal Internal Revenue Collectors and Agents cited section 167, Title 26, of the Federal Internal Revenue Code in support of their activities in unlawfully assigning, transferring and delivering assets, funds and property from the aforesaid benevolent trust estate, a charitable organization, without permission from appellants or anyone else, to the account of William D. Noland, personally, and thereby levying additional income taxes against William D. Noland, personally, an appellant hereof, and said section 167 of the Federal Internal Revenue Code provides that where the trustee, trustor, and beneficiary are one and the same, the income tax is charged to the trustor, and within the aforesaid benevolent trust estate and charitable organization, there are a board of trus-

tees and numerous beneficiaries, therefore, the said granting of motions for summary judgments and dismissing the second amended bill complaint, and the District Court below making and entering said summary judgments on April 21, 1948, was a denial of constitutional rights and due process of law against appellants.

Point 3.

Aforesaid section 167, Title 26, of the Federal Internal Revenue Code does not apply to the aforesaid benevolent trust estate and charitable organization and it does not apply to William D. Noland personally, therefore, the aforesaid Internal Revenue Collectors and Agents violated Section 23, Subdivision (o), Title 26, Federal Internal Revenue Code, which provides for charitable and other contributions, and under paragraph (2) of said section and subdivision it provides a corporation, trust, or community chest, fund, or foundation, created or organized in the United States or any possession thereof or under the laws of the United States or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which enures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation. The said provision of Title 26, section 23, (o)(2) is the law that governs the

aforesaid benevolent trust estate and charitable organization, and the aforesaid section 167, Title 26, of the Federal Internal Revenue Code as cited by said Internal Revenue Collectors and Agents, in support of their unlawful activities as set forth in the record hereof on appeal, does not rule and govern, and the District Court below, in making and entering the aforesaid summary judgments on April 21, 1948, and dismissing complainants and appellants second amended bill of complaint, it was a denial of constitutional rights and due process of law against appellants.

Point 4.

On March 30, 1948, in a hearing before the District Court below, motions were made by the defendants for summary judgments against the first amended bill of complaint, and at the said hearing on said date, complainants made a motion to amend first amended bill of complaint, and the said District Court below ordered that the said first bill of complaint be amended, and the said Court also allowed the said motions by said defendants for summary judgments to lay on the record and stand against the second amended bill of complaint when amended, filed and served, and the said Court granted and ordered leave to amend the first amended bill of complaint on March 30, 1948, at said hearing before said Court, and the second amended bill of complaint was filed and served on April 19, 1948, and on April 21, 1948, the said Court, from the motions for summary judgments

presented to said Court on March 30, 1948, made and entered two summary judgments against complainants' second amended bill of complaint by granting the said motions for summary judgments made by defendants on said date of March 30, 1948, the two said summary judgments being made and entered by the said Court on April 21, 1948, which was a denial of complainants' constitutional rights and due process of law.

Point 5.

On April 21, 1948, the District Court below made and entered a summary judgment, dismissing the second amended bill of complaint in favor of Harry C. Westover, defendant, and against complainants, and the motion for summary judgment was made before the said Court on March 30, 1948, by the counsel for said defendant, the said motion for summary judgment being made against complainants' first amended bill of complaint, and the said Court granted a motion by complainants to amend first amended bill of complaint making an order to such effect, and the second amended bill of complaint in compliance with the order of said Court on March 30, 1948, and on April 19, 1948, the second amended bill of complaint was filed and served, and the said Court made and entered the said summary judgment on April 21, 1948, by granting a motion for summary judgment made by the said defendant on March 30, 1948, and the said motion for summary judgment was filed and served December 1, 1947, against the first amended bill of complaint of com-

plainants, thereby the complainants were denied their constitutional rights and due process of law.

Point 6.

On March 30, 1948, a motion for summary judgment was made by defendants George D. Martin, Norman Hayward, Raymond B. Sullivan and John H. Cramer, in the District Court below, against the first amended bill of complaint of complainants, and on the said date of March 30, 1948, before the said Court the complainants made a motion to amend the first amended bill of complaint, and the said Court granted said motion to amend by making an order to amend said bill of complaint, and complainants filed and served second amended bill of complaint on April 19, 1948, and the said motion for summary judgment was filed and served on December 1, 1947, against the first amended bill of complaint of complainants, and the said Court on April 21, 1948, granted the motion for summary judgment made on March 30, 1948, against the first amended bill of complaint, by allowing said motion for summary judgment to lay over on the record to apply it against the second amended bill of complaint of complainants, and the said Court on April 21, 1948, made and entered a summary judgment against the second amended bill of complaint of complainants and in favor of said defendants, thereby denying complainants of constitutional rights and due process of law.

Wherefore, complainants and appellants respect-

fully pray that the aforesaid summary judgments of the aforesaid District Court below be reversed.

Dated Los Angeles, Calif., May 22, 1948.

Respectfully submitted,

/s/ WILLIAM D. NOLAND,

Trustee,

Appellant in Propia Persona.

/s/ WILLIAM D. NOLAND,

Personal,

Appellant in Propia Persona.

Received copy of above July 14, 1948.

/s/ JAMES M. CARTER,

U. S. Atty.,

/s/ O. H. MITCHELL,

Asst. U. S. Atty.,

Attorneys for Appellees.

[Endorsed]: Filed July 16, 1948. Paul P. O'Brien, Clerk.

No. 11978

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM D. NOLAND, Trustee, and WILLIAM D. NOLAND, Personal,

Appellants,

vs.

HARRY C. WESTOVER, Collector, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division; GEORGE D. MARTIN, Internal Revenue Agent in Charge, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division; NORMAN HAYWARD, Internal Revenue Agent, Los Angeles, California; RAYMOND B. SULLIVAN, Acting Internal Revenue Agent, Los Angeles, California; and JOHN H. CRAMER, Internal Revenue Agent, Los Angeles, California,

Appellees.

BRIEF OF APPELLANTS.

In Support of Appellants' Second Amended Bill of Complaint, Objections to All Motions for Summary Judgment and Dismissal Made by Defendants and Appellees, and Transcript of Record on Appeal Hereof.

WILLIAM D. NOLAND, Trustee,
and

WILLIAM D. NOLAND, Personal,
2030 Wilshire Boulevard, Los Angeles 5,
In Propria Persona.

TOPICAL INDEX

	PAGE
Statement of the case.....	1
Jurisdiction	4
Concise abstract of the case.....	5
Court in error.....	8
Specification of errors.....	10
Court is in error.....	13
Summary	17
Argument	21
Points and authorities.....	21
Conclusion	36

TABLE OF AUTHORITIES CITED

CASES	PAGE
Arkadelphia Mill Co. v. St. Louis So. Western, 249 U. S. 134....	34
Benson v. Bunting, 127 Cal. 532, 59 Pac. 991, 78 Am. S. R. 81	34
Boyd v. United States, 116 U. S. 616.....	30
Buchanan v. Warley, 245 U. S. 60.....	27
Clews v. Jamison, 182 U. S. 461, 21 S. Ct. 845, 45 L. Ed. 1185	23
Cummings v. Missouri, 4 Wall. 277.....	24
Dixon v. Holden, L. R. 7 Eq. 488.....	27
Dreham v. Stifle, 8 Wall. 601.....	24
Dufford v. Nowakoski, 125 N. J. Eq. 262.....	22
Edwards v. Kearzey, 96 U. S. 600.....	25
Elliot v. Freeman, 220 U. S. 178.....	29
Farrington v. Tennessee, 95 U. S. 683.....	25
Fletcher v. Peck, 6 Cranch. 138.....	24
Forbes v. Pioneer Boat Line v. Board of Comrs., 258 U. S. 338	29
Garland, Ex parte, 4 Wall. 377.....	24
Green v. Biddle, 8 Wheat. 84.....	26
Hunt v. Adm'rs., 1 Pet. (U. S.) 13.....	34
Johnson v. Waters, 111 U. S. 640, 28 L. Ed. 547.....	35
Lamb v. Powder River, etc. Co., 132 Fed. 434.....	29
Marbury v. Madison (Cranch.), 1 U. S. 5.....	24
McCracken v. Hayward, 2 How. 608.....	35
Munn v. Illinois, 94 U. S. 113.....	31
Nelson v. St. Martin's Parish, 111 U. S. 720.....	25
New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 Pac.	
990, Ann. Cas. 1918C, 1022.....	28
Pensacola Telegraph Co. v. Western Union Telegraph Co., 96	
U. S. 9.....	31
Planters Bank v. Sharp, 6 How. 327.....	26
Prudential Ins. Co. v. Cheek, 259 U. S. 530.....	27
Sawyer, Re, 124 U. S. 200, 8 S. Ct. 482, 31 L. Ed. 402.....	23
Smith v. Morse, 2 Cal. 500.....	35
Smyth v. Ames, 169 U. S. 466.....	31
Snypp v. St. of Ohio, 70 F. 2d 535.....	35

	PAGE
Sturgis v. Crowninshield, 4 Wheat. 197.....	26
Swedesboro Loan, etc. Assoc. v. Gans, 65 N. J. Eq. 132, 55 Atl. 82	34
Taylor v. Kercheval, 82 Fed. 497.....	31
Tyler v. Savage, 143 U. S. 79, 12 S. Ct. 340, 36 L. Ed. 82.....	35
Walker v. Whitehead, 16 Wall. 314.....	25
Weeks v. United States, 232 U. S. 392.....	30
Wight v. United States, 176 U. S. 512.....	31

STATUTES

Internal Revenue Code, Title 26, Sec. 23, Subd. (a), par. (1)....	3, 18, 19
Internal Revenue Code, Title 26, Sec. 23, Subd. (o), par. (2)....	3, 4, 18, 19
Internal Revenue Code, Title 26, Sec. 120.....	3, 4, 18, 20
Internal Revenue Code, Sec. 167	2, 3, 4, 7, 18, 19
Judicial Code, Sec. 24.....	4
Judicial Code, Sec. 128.....	4
Judicial Code and Judiciary, Title 28, Sec. 41.....	4
Judicial Code and Judiciary, Title 28, Sec. 225.....	4
53 Statutes at Large, p. 56.....	4
Statute of Uses, England 27, Henry VIII, Chap. 10, A. D. 1536	22
United States Constitution, Art. I, Sec. 9, Clause 3.....	22, 23
United States Constitution, Art. I, Sec. 10, Clause 1.....	22, 25
United States Constitution, Art. IV, Sec. 1.....	30, 34
United States Constitution, Fourth Amendment.....	30
United States Constitution, Fourteenth Amendment, Sec. 1....	27, 34

TEXTBOOKS

Black's Law Dictionary, p. 937.....	31
Cooley's Constitutional Limitations (4th Ed.), p. 56 (45).....	34
Cooley's Constitutional Limitations, p. 159.....	35
12 Corpus Juris, Sec. 114, p. 589.....	31
Story on Agency, Sec. 3.....	31

No. 11978

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM D. NOLAND, Trustee, and WILLIAM D. NOLAND, Personal,

Appellants,

vs.

HARRY C. WESTOVER, Collector, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division; GEORGE D. MARTIN, Internal Revenue Agent in Charge, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division; NORMAN HAYWARD, Internal Revenue Agent, Los Angeles, California; RAYMOND B. SULLIVAN, Acting Internal Revenue Agent, Los Angeles, California; and JOHN H. CRAMER, Internal Revenue Agent, Los Angeles, California,

Appellees.

BRIEF OF APPELLANTS.

Statement of the Case.

The matter hereof before the above entitled Appellate Court is an appeal from a Summary Judgment and Dismissal of Second Amended Bill of Complaint in favor of Defendant and Appellee Harry C. Westover, and a Summary Judgment and Dismissal of Second Amended Bill of Complaint in favor of Defendants and Appellees, George D. Martin, Norman Hayward, Raymond B. Sullivan, and John H. Cramer [Tr. of Record pp. 81 to 85, incl.], said Summary Judgments and Judgments of Dismissal of said Second Amended Bill of Complaint made and entered by the District Court of the United States,

Southern District of California, Central Division, on April 21st, 1948, the Honorable Charles C. Cavanah, presiding as the Judge of the said District Court of the United States, hearing motions for said judgments on March 30, 1948.

The controversy in the action in the District Court below, arose over a disagreement between the complainants and defendants as to which Federal Internal Revenue Statute governed the payment of income taxes; the defendants claimed that the complainants were governed by a situation created and established by defendant Norman Hayward, Internal Revenue Agent [Tr. of Record par. 4, pp. 15 and 16, par. 5, and 6, pp. 16 to 18, incl.] and the said defendant Norman Hayward transferred from the assets, funds and property belonging to Dr. William D. Noland Trust Estate, Ltd., a Benevolent Trust Estate, a charitable organization, one third of the assets, funds and property of said charitable organization to the personal account of William D. Noland personally, and charged income taxes against William D. Noland personally, the said Norman Hayward made the said transfers from the said charitable organization to William D. Noland personally, without any consent from the board of trustees for said charitable organization or from William D. Noland personally to make such tax charges against him personally, and then the defendants herein in the District Court below and appellees in above entitled Appellate Court, followed the activities of said Norman Hayward, by piling up more and more taxes against the said charitable organization, and against the said William D. Noland personally, and cited Section 167 of the Internal Revenue Code in support of their taking assets, funds and property from the said charitable organization and charg-

ing same to the personal account of William D. Noland and charging him with more income taxes [Tr. of Record p. 53], said defendants cite "Sec. 167 of the Federal Internal Revenue Code where the trustee and trustor and the beneficiary are the same the income is taxable to the Trustor"; the said Sec. 167 does not apply to the case at all, because the said charitable organization is composed of a board of trustees and there are numerous beneficiaries [Tr. of Record, Ex. A, pp. 36 to 49, incl.] and the method of taxation adopted as alleged in the Second Amended Bill of Complaint [Tr. of Record pp. 13 to 35, incl.] are very clearly shown that the policy of taking assets, funds and property from the said charitable organization and charging same to the personal account of William D. Noland for additional income taxation, such as was created and established by the said Norman Hayward when he went over the trustees books and records by threats and force without permission of the trustees, thus was unlawful income taxation charged to said William D. Noland personally [Tr. of Record, Ex. E, pp. 51 to 57, incl.] and Appellants contend that the laws that do govern and rule, in the operations of aforesaid benevolent trust estate and charitable organization [Tr. of Record par. 24, pp. 30 to 31, incl.] and [Tr. of Record par. 5, p. 34] which said laws provide under Title 26, Internal Revenue Code (Federal), Section 23, Subdivision (a), Paragraph (1), which provides that expenses in general may be deducted from gross income, and under said Title 26, Internal Revenue Code, Section 23, Subdivision (o) Paragraph (2), which provides for charitable and other contributions and charitable organizations, the unlimited deductions may be made for charitable and other contributions, and under said Title 26, Federal Internal Revenue Code, Section 120, it provides, in the case of an individual (Wil-

liam D. Noland, personal is an individual) if in the taxable year and in each ten preceding taxable years the amount of the contributions or gifts described in section 23 (o) (or corresponding provisions of prior revenue Acts) plus the amount of income, war-profits, or excess-profits taxes paid during such year in respect of preceding taxable years, exceeds 90 per centum of the taxpayers net income for each such year, as computed without the benefit of the applicable subsection, then the 15 per centum limit imposed by section 23 (o) shall not be applicable (53 Stat. 56). Thus, the appellants contend that said sections 23 and 120 as cited are the rules and laws that govern the appellants in the operations of aforesaid charitable affairs and that aforesaid Section 167 of Federal Internal Revenue Code, as cited by defendants does not apply to the matters involved in this action hereof on appeal before the above entitled Circuit Court of Appeals for the Ninth Circuit.

Jurisdiction.

The jurisdiction of the United States District Court, Southern District of California, Central Division, is well established by the aforesaid statutes which are involved in the matter hereof, and for further jurisdiction in said District Court below, it provides under Title 28, Judicial Code and Judiciary, Section 41. (Judicial Code, Section 24.) Original Jurisdiction. The District Courts shall have original jurisdiction as follows: (5) Cases under internal revenue, customs, and tonnage laws. Fifth. Of all cases arising under any law providing for internal revenue, etc., and jurisdiction in the above entitled United States Circuit Court of Appeals for the Ninth Circuit for this appeal is provided under Title 28, Judicial Code and Judiciary, Section 225. (Judicial Code, Section 128.)

Appellate jurisdiction—(a) Review of final decisions. The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions—First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court, and: Fifth. (d) Circuits in which reviews shall be had. The decisions of a District Court of the United States within a State in the Circuit Court of Appeals for the circuit embracing such State, therefore, appellants contend that the said District Court below had jurisdiction and that the above entitled United States Circuit Court of Appeals, for the Ninth Circuit, have jurisdiction to review the matter hereof on appeal from the United States District Court, Southern District of California, Central Division.

Concise Abstract of the Case.

Pursuant to the matters and proceedings set forth in the preceding statement of the case hereof, counsel for defendants files and serves Motion to Dismiss [Tr. of Record pp. 2 to 7, incl.] and Affidavit in Support of Motion to Dismiss [Tr. of Record p. 8], and complainants file and serve, Objection to said Motion to Dismiss [Tr. of Record p. 9], and Exhibit A in support of said Objection to Motion to Dismiss [Tr. of Record pp. 10 to 13, incl.].

Counsel for defendants file and serve, Notice of Motion, Motion by Defendant Harry C. Westover for Summary Judgment, Affidavit in Support of Motion by Harry C. Westover for Summary Judgment, Motion by Defendants other than Harry C. Westover for Summary Judgment, and Affidavits in Support of Motion by Defendants other than Harry C. Westover for Summary Judgment [Tr. of Record pp. 57 to 78, incl.], and complainants file and serve Objection to Motion by Defendant Harry C. West-

over for Summary Judgment, and Objection to Motion by Defendants other than Harry C. Westover for Summary Judgment [Tr. of Record pp. 78 to 80, incl.].

Complainants file and serve in Case No. 7315-O'C, a Motion to Amend Complaint [Tr. of Record pp. 85 to 86, incl.]; Complaint in Cause No. 5716-W [Tr. of Record pp. 98 to 115, incl.]. And Order and Judgment of Dismissal as to Defendant Joseph D. Nunan, Jr., and Order and Judgment of Dismissal as to Defendants George D. Martin, Norman Hayward, Raymond B. Sullivan, and John H. Cramer, Internal Revenue Agents, are filed [Tr. of Record pp. 115 to 120, incl.], in aforesaid case and Cause No. 5716-W. Second Amended Complaint filed April 19, 1948 [Tr. of Record pp. 13-34].

Complainants file an application in form of Affidavit in Support of Extension of Time on Appeal, which is granted by an Order Extending Time of Appeal [Tr. of Record pp. 120 to 122, incl.], and file statement of points (DC) [Tr. of Record pp. 122-124] and statement of points (USCA) [Tr. of Record pp. 196-202].

On March 30, 1948, a hearing was held on the foregoing motions and objections before the Honorable Charles C. Cavanah, Judge of District Court below, and minute order of said Court [Tr. of Record pp. 86 to 89, incl.] shows that Court orders said motions for Summary Judgment by defendants stand submitted pending further order of the Court, and Docket Entries [Tr. of Record pp. 89 to 91, incl.] show what was filed from 3/19/48 to 5/4/48 in said docket.

During the hearing and proceedings of March 30, 1948, Mr. Oakes, presented and argued the motions of the defendants as their counsel, laying great stress on summary judgment, on the ground of *stare decisis*, and dismissal for defendant Harry C. Westover, Collector, and likewise laying great stress on summary judgment, and dismissal for defendants other than defendant Harry C. Westover [Tr. of Record pp. 129 to 149, incl.], and Dr. Noland (William D. Noland) for himself as Trustee and Personal, presented and argued in opposition to counsel for the defendants, upon the grounds that not one authority cited applied to this situation wherein a charitable organization was involved, and that the main issue of wherein Section 167 of the Federal Internal Revenue Code was cited by them in support of the unlawful activities of aforesaid Internal Revenue Agents as set forth was evaded and not dwelled upon by going into other technical matters [Tr. of Record pp. 149 to 173, incl.] which the record clearly shows, and when Dr. Noland finished his argument in opposition to defense counsel's presentation and argument; Mr. Oakes, counsel for defendants, again argued [Tr. of Record pp. 173 to 179, incl.] and as it was 12:00 noon a recess was taken until two o'clock. And upon return after the recess at two o'clock, Dr. Noland again argued against the presentation and argument of Mr. Oakes, counsel for defendants [Tr. of Record pp. 179 to 185, incl.], also showing that the controversy was still going on by demands being made by said Internal Revenue Agents and contending that his action was

in order, and the Court granted leave to complainants to amend bill of complaint.

Mr. Oakes, counsel for the defendants, again argued for the defendants [Tr. of Record pp. 186 to 188, incl.] and upon the closing of Mr. Oakes argument, the Court allowed the motions of the defendants for summary judgment and dismissal to lay on the files against the unwritten amended bill of complaint, as the Court formerly in the proceedings had granted leave to amend the bill of complaint, there are two defendants motions for summary judgment and dismissal [Tr. of Record pp. 58 to 73, incl.], and the Court took the matter under submission.

Court in Error.

And under date of April 19, 1948, the District Court made a written opinion of the matter, Case No. 7315-O'C, in which written opinion there is an error on the part of the District Court, because in the Court's reference to Case No. 5716-W, both said cases in the District Court below, at page 191, Tr. of Record par. Sixth, it reads, as follows (in Court's written opinion):

“Sixth, that plaintiff be given \$50.00 damages for fraud as a result of wrongful transfer effected by defendants, and mental anguish, *et cetera*, caused thereby.”

Instead it properly should read, as follows (Case No. 5716-W):

“6. That the complainants be awarded and given judgment in the sum of Fifty Thousand Dollars (\$50,000.00) as compensated damages against the

aforesaid defendants and each of them for fraudulently taking the trustees' books and records and making fraudulent confiscations, assignments, transfers and deliveries from said records and books, and also likewise from income tax returns made by complainants to aforesaid Internal Revenue Service, from the aforesaid benevolent trust estate to William D. Noland personal account for additional taxes, and for causing to complainants endless mental anguish, molestation, annoyance, harassment, persecution, damages, losses and injuries since July 6, 1942, and continuously, including the present time." [Tr. of Record par. 6, pp. 113 to 114, incl.]

This said paragraph 6, shows that the Case No. 5716-W in District Court below was an individual action against the defendant Internal Revenue Agents individually, and not the U. S. Government, and the said Case No. 7315-O'C is an action against the said Government, therefore a *res adjudicata* will not lawfully lie on the files in support of aforesaid two motions by defendants for summary judgments and dismissal [Tr. of Record p. 132; third par., p. 187, and first par., p. 190], and pleading *res adjudicata* from an action against individuals will not stand in a case against the United States Government, it is an action against different parties, regardless of the contents of the bill of complaint.

On April 21, 1948, the District Court below made and entered a summary judgment and dismissal in favor of defendant Harry C. Westover, and on April 21, 1948, the District Court below made and entered a summary judgment and dismissal in favor of defendants George D. Martin, Norman Hayward, Raymond B. Sullivan and John H. Cramer [Tr. of Record pp. 81 to 85, incl.].

Specification of Errors.

I.

The Court erred in making the order and decree for summary judgment and dismissal on April 21, 1948, in favor of defendant Harry C. Westover, in sustaining a motion for said judgment by said defendant to lay on files against an unwritten amended complaint after the Court had granted leave to amend the bill of complaint.

II.

The Court erred in making the order and decree for summary judgment and dismissal on April 21, 1948, in favor of defendant Harry C. Westover, in sustaining a motion for said judgment by said defendant upon the ground of *stare decisis*.

III.

The Court erred in making the order and decree for summary judgment and dismissal on April 21, 1948, in favor of defendant Harry C. Westover, in sustaining a motion for said judgment by said defendant upon the ground that the present defendant and Collector cannot be held liable for acts before he commenced his duties, said defendant is not sued personally, only as U. S. Agent.

IV.

The Court erred in making the order and decree for summary judgment and dismissal on April 21, 1948, in favor of the aforesaid defendants other than defendant Harry C. Westover, upon the ground and principle of *res adjudicata*.

V.

The Court erred in making the order and decree for summary judgment and dismissal on April 21, 1948, in

favor of aforesaid defendants other than defendant Harry C. Westover, upon the ground that the instant Case No. 7315-O'C is the same as Case No. 5716-W.

VI.

The Court erred in making the order and decree for summary judgment and dismissal on April 21, 1948, in favor of aforesaid defendants other than defendant Harry C. Westover, upon the ground that complainants are not entitled to relief.

VII.

The Court erred in making the order and decree for summary judgment and dismissal on April 21, 1948, in favor of aforesaid defendants other than defendant Harry C. Westover, in sustaining a motion for said judgment by said defendants to lay on files against an unwritten amended complaint after the Court had granted leave to amend the bill of complaint.

The said specifications of errors, numbered I to VII inclusive, are based and founded upon appellants' statement of points on appeal [Tr. of Record pp. 196-202], and upon statements in the Reporter's Transcript of Proceedings under date of April 19, 1948, wherein the Court said:

"The Court: I want to dispose of a matter that has been submitted for decision. It is case No. 7315, Noland and others against the Collector of Internal Revenue and certain agents of the Government.

"The case is before the court on motions for summary judgments of the defendant and the dismissal of the action on the ground, first, that the complainants are precluded from bringing the instant action against defendants on the principle of *res adjudicata*

as the complainants are the same complainants who brought the action in this court in Case No. 5716-W on January 9, 1947, in which the action was dismissed and was a case where the complainants sought relief of a refund of the same tax payments as are included in the instant case, and a prayer for relief in the former action which related to the instant subject matter.

“That case was first brought by William D. Noland, H. K. Miller, and Harry R. Maxwell, Trustees of the Dr. William D. Noland Trust Estate, Limited, a benevolent trust estate, and William D. Noland versus George D. Martin, Internal Revenue Agent, and other agents.

“The complaint was filed on August 26th, 1946, and judgment of dismissal was signed on January 9, 1947.” [Tr. of Record pp. 189-190.]

And in the said proceedings, the Court further said:

The instant action was filed on July 7, 1947.

The amended complaint is brought by the same parties plaintiff and the same parties defendant with two exceptions. The defendant Nunan is omitted and the defendant Harry C. Westover, Collector of Internal Revenue, has been added.

The Court granted a motion permitting the eliminating and adding of these names.

The prayer of the amended complaint in the instant action is as follows:

“First, that Section 167 of the Federal Internal Revenue Code does not apply to the aforesaid benevolent trust estate, namely Dr. William D. Noland Trust Estate, Limited, and that any attempt to apply

or make application of said Section 167 to said benevolent trust estate is null and void and of no effect whatsoever.

Second, that as a benevolent trust estate the trustees do not have to file an income tax return and that no taxes are due.

Third, that since William D. Noland personally has contracted to give his personal services to the trust estate without profit that the trust estate is properly paying the living expenses of Dr. Noland and that Dr. Noland owes no taxes.

Fourth, that all monies paid by defendants be refunded with interest.

This contention of the defendants is sustained by the record in both cases.” [Tr. of Record p. 192.]

Court Is in Error.

In the Transcript of the Record at page 192, the Court is in error, because the Court granted an application to amend the bill of complaint [Tr. of Record p. 185, last 3 pars.] which reads, as follows:

“The Court: You need not read all of them. I will have to check into them.

Dr. Noland: Your Honor, my contention is that my suit is in order. Opposing counsel contends that the statutory limitation invoked in this case . . . I think your Honor can see that this suit was filed before the three-year statutory limitation period. I was very careful in checking that before even I filed the suit. And I appreciate and beg this court to deny their motions and grant leave to amend.

The Court: They have conceded that you can have your amendment. That is all conceded.”

Upon the leave to amend being granted by the Court, complainants amended the bill of complaint, and the bill was amended as "Second Amended Bill of Complaint" which was filed on April 19th, 1948, and under date of April 19th, 1948, in aforesaid proceedings, the Court erred in reading into the record the prayer of the first amended bill of complaint, which is hereinbefore repeated, whereas, the Court should have read into the record the prayer of the "Second Amended Bill of Complaint" which reads [Tr. of Record pp. 33-34] as follows:

"Wherefore, complainants pray for process and judgment as follows:

1. That Section 167 of the Federal Internal Revenue Code does not apply to the aforesaid benevolent trust estate, namely, Dr. William D. Noland Trust Estate, Ltd., nor to the complainants, William D. Noland, Trustee, or William D. Noland personally, and that any attempt to apply or make such application of said Section 167, to said benevolent trust estate or complainants is null and void of such application and of no effect whatsoever.

2. That the complainant William D. Noland, Trustee, for aforesaid benevolent trust estate, does not have to file any income tax return and that the said complainants William D. Noland, Trustee, and William D. Noland personally, do not owe the Internal Revenue Service or its Agents any income taxes of any kind whatsoever.

3. That since William D. Noland personally has made and executed a contract with the trustees of aforesaid benevolent trust estate, as a charitable organization, to give his skill, knowledge and labor to the said benevolent trust estate and its trustees, for the benefit of the beneficiaries who are poor people

and children who are unable to pay for health service; without salary, wages or profit, and that said contract is a valid and lawful contract and that the complainant William D. Noland had a lawful right to make said contract, therefore, the said complainant does not owe any income taxes, as there is no income from salary, wages or profit from the said benevolent trust estate.

4. That complainant William D. Noland, Trustee, is a party to the contract under which the aforesaid benevolent trust estate is established and that it be adjudged and decreed that the said contract is a valid and lawful contract, and that the said benevolent trust estate is a charitable organization.

5. That it be adjudged and decreed that the matters which are involved herein, are subject to the provisions under Title 26, Internal Revenue Code, Section 23, Subdivision (a), Paragraph (1), Subdivision (o), Paragraph (2), and Section 120, as the law that governs and rules instead of Section 167 of the Federal Internal Revenue Code.

Wherefore, complainants pray for such other order, orders, aid and relief as the court may deem proper and just in the premises."

Dated: Los Angeles, California, April 15, 1948. Filed and served April 19, 1948.

Counsel for the defendants in argument for Summary Judgments [Tr. of Record p. 148], said:

"Then these Proposals to Amend also request the court to allow the prayer for relief to be changed. I think it is immaterial whether the prayer for relief is changed because there is no change in the facts alleged. So, if there is any amendment along this line

we would merely ask your Honor to have the motions for summary judgment filed against the amended complaint to also stand against the amended complaint as further amended by these proposals.

We don't think that the complaint is entitled to these additional amendments because he was allowed the privilege to amend his complaint once and these proposals come at a late date, after the case has been at issue for several months, in the sense that our motions have been pending. But if the complaint is to be granted the privilege of further amending we would merely request that our motion for summary judgment stand against the complaint as still further amended."

Complainant William D. Noland objected to the motions for summary judgments and to standing on files against unwritten amended complaint to be amended [Tr. of Record p. 149], by replying:

"Dr. Noland: Your Honor, I object to the motion of the defendant for *res adjudicata* in its entirety. I also object to all the motions in their entirety upon the ground that there is not one citation in point.

All of their citations are pertaining to corporations or individuals. Not one citation pertains to a charitable organization or institution of any kind. Therefore, I feel that their motions should be denied.

That this Honorable Court may better understand the position which I take here, it is true I am not a lawyer. I am a layman. I am not representing the Trust. The Trust is not a complainant. I am not representing the other Trustees. I am not representing anyone or anything except my personal interests as William D. Noland, Trustee, under the contract, and William D. Noland personally."

The Court allowed the said motions for summary judgments to stand against the unwritten complaint to be amended, which the Court granted leave to amend, and the bill was amended and filed as the "Second Amended Bill of Complaint," and the Court sustained said motions for summary judgments, dismissing Second Amended Bill.

Summary.

On June 1, 1935, the Benevolent Trust Estate, namely Dr. William D. Noland Trust Estate, Ltd., was organized and started doing business as a charitable organization, as time passed, some of the original trustees resigned and other trustees were elected in their place and stead, and the charitable work of the said charitable organization is caring for and restoring health for poor people and children who are afflicted with illness, who have no funds with which to pay for such service, and no way of obtaining such service for their recovery to good health.

On or about July 2, 1942, one of the Federal Internal Revenue Agents called at the headquarters of the aforesaid charitable organization, and demanded by threats of arrest that he be given the trustees books and records, which was done and the said Revenue Agent then examined the said books and records, and set out one-third of the amounts as shown on the books and records, charged the said one-third of amounts to the personal account of William D. Noland, personally, and charged income taxes against the said William D. Noland based upon the amounts the said Revenue Agent had taken from the

trustees books and records and the said Revenue Agent did not have permission of the said trustees to do any of the things he did.

Following the charging of the aforesaid amounts to William D. Noland personal account for income taxation, demands were made continuously for the payment of said charges for income taxation, and as demands were made from time to time, the amounts demanded each time increased into such large amounts, that it would be impossible for either the aforesaid charitable organization or William D. Noland personally to pay such large demands as were made by the Internal Revenue Agents, and finally in the hope of settling the controversy, complainants filed a law suit for the purpose of getting the controversy and matters hereof settled and determined.

The contract under which the aforesaid charitable organization is established [Tr. of Record p. 36], is a document under the provisions of the Constitution of the United States of America, and defendants claim it is ruled by Section 167 of Federal Internal Revenue Code [Tr. of Record par. 3, p. 53], and complainants claim that the said charitable organization is ruled by and under the provisions of Title 26, Internal Revenue Code, Section 23, subdivision (a), paragraph (1), subdivision (o), paragraph (2), and Section 120 [Tr. of Record par. 5, p. 34].

Thus, briefly is the controversy in this matter, if it were possible to determine which are the rules that govern, this controversy would be settled, and the Federal Internal Revenue Codes cited read as follows:

Defendants cite at [Tr. of Record p. 53] as follows (Sec. 167, Internal Revenue Code):

Name: WILLIAM D. NOLAND. Year: 1942

Net income disclosed by return Form 1041 No. 1453688 \$287.63.

Add: The detail of income and expenses is shown on the next sheet attached.

Under Sec. 167 of the Internal Revenue Code where the trustee and trustor and the beneficiary are one and the same the income is taxable to the Trustor . . . 3,935.47. (Italics are complainants.)

Complainants cite Title 26, Internal Revenue Code, Section 23, subdivision (a), paragraph (1), which reads as follows (a) Expenses. (1) In general:

“All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.”

And subdivision (o), paragraph (2), of said Title 26, Section 23, reads as follows (o) Charitable and other contributions:

“(2) A corporation, trust, or community chest, fund, or foundation, created or organized in the

United States or of any State or Territory or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which enures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.”

And Section 120 of aforesaid Title 26, reads as follows:

“Sec. 120. Unlimited deductions for charitable and other contributions.

In the case of an individual if in the taxable year and in each of the ten preceding taxable years the amount of the contributions or gifts described in section 23 (o) (or corresponding provisions of prior revenue Acts) plus the amount of the income, war-profits, or excess-profits taxes paid during such year in respect of preceding taxable years, exceeds 90 per centum of the taxpayer's net income for each such year, as computed without the benefit of the applicable subsection, then the 15 per centum limit imposed by section 23(o) shall not be applicable. (53 Stat. 56.)

Thus are the federal internal revenue statutes under which complainants contend that the aforesaid charitable organization is ruled and governed and not by aforesaid Sec. 167 of federal internal revenue code as claimed by the defendants.”

ARGUMENT.

Points and Authorities.

The charitable organization hereof is established by a contract under the provisions of the Constitution of the United States of America [Tr. of Record pp. 36-49], as a benevolent trust estate, dated June 1, 1935, and recorded in Maricopa County, State of Arizona, on June 8, 1935, with a branch office at Suite 201-205, 2030 Wilshire Boulevard, Los Angeles 5, California.

The title of the contract and document under which the said benevolent trust estate is organized reads as follows:

“Contract and agreement embodying the following terms, conditions, stipulations, Acceptance and covenants to establish a benevolent trust estate to be administered by natural person trustees in joint tenancy, holding in trust as to distribution of avails, acting under citizenship, common law rights of contract, and constitutional rights, federal laws and Immunities vouchsafed to all person, as set forth and provided in and by the Constitution of the United States of America.” [Tr. of Record, p. 36.]

And the said contract was written by the late Franklin P. Bull, who had practiced law in the State of California for over 50 years, and he was commonly known as Judge Bull.

1.

The right to create and establish a trust estate has always been recognized in all history of law in the United States and England, beginning with the reign of Henry VIII of England, in the year of A. D. 1536, and up to and including the present time, in the sustaining of common law rights of contract, citizenship and property rights:

Statute of Uses, England 27, Henry VIII, chap. 10, A. D. 1536.

And the aforesaid benevolent trust estate is established by contract, and the impairment of obligation of contract is prohibited by the Constitution of the United States, as it provides as follows:

Article I, Section 9, Clause 3, provides:

“No Bill of Attainder or *ex post facto* law shall be passed.”

Section 10, Clause 1, provides:

“No State shall . . . Pass any Bill of Attainder, *ex post facto* law, or law impairing the obligation of contract.”

Courts usually regard the rights of citizens to contract and are not unmindful that “public policy requires . . . that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts of justice,” and that this freedom of contracts is not to be interfered with lightly:

Dufford v. Nowakoski (Rafferty, J.), 125 N. J. Eq. 262, 4 A.

2.

A Court ruling of vast importance to complainants hereof and the matters involved in this action; is wherein Federal Justice Gresham upheld the right of complainants, when he said in case (27 Fed. 149):

“A citizen of the United States cannot be denied the right to take and hold absolutely in trust, real and personal property in any State in the Union, nor can he be denied the right to accept conveyance in trust for his sole benefit or for the benefit of himself and others. This Right is incident to National Citizenship.”

Complainants have been denied the said right, which is clearly shown in the Second Amended Bill of Complaint in the Transcript of the Record hereof [Tr. of Record pp. 13-34], and thereby complainants have been denied of their property and civil rights, and a civil right of any precuniary nature or character is a property right and a Court will concern itself in protecting such right:

Re Sawyer, 124 U. S. 200, 210 (8 Sup. Ct. 482), 31 L. Ed. 402, 409, and the Court will support the trustees in carrying out the terms of their trust estate contract and agreement:

Clews v. Jamison, 182 U. S. 461 (21 Sup. Ct. 845), 45 L. Ed. 1185.

3.

The aforesaid benevolent trust estate [Tr. of Record pp. 36-49] is established by a contract, and the impairment of the obligation of contract, is prohibited by the Constitution of the United States of America:

Article 1, Sec. 9, Clause 3, Const. U. S. A.

The said clause 3, provides:

“No Bill of Attainder or *ex post facto* law shall be passed.”

A Bill of Attainder is a legislative Act which inflicts punishment without a judicial trial. The term embraces bills of pains and penalties, and legislation is none the less objectionable in that it merely confiscates property; it may affect the life of an individual, or confiscate his property, or both. The framers of the Constitution must be deemed to have had in mind the meaning commonly given to the term “bill of attainder” at that time:

Fletcher v. Peck, 6 Cranch 138;

Dreham v. Stifle, 8 Wall. 601.

The object of the aforesaid Clause 3, is to secure the rights of citizens against deprivation by legislative enactment in any form whatsoever or however disguised, and laws operating to exclude a citizen from any profession or avocation for the past conduct are objectionable as bills of pains and penalties and are prohibited by this said clause:

Cummings v. Missouri, 4 Wall. 277, 323;

Ex parte Garland, 4 Wall. 377,

and in an outstanding case (*Marbury v. Madison*, Cranch 1, U. S. Rep. 5), the court said (at page 58):

“The very essence of Civil Liberty certainly consists in the right of every individual to claim the protection of the law, whenever he receives an injury, one of the first duties of Government is to afford that protection.”

The Constitution of the United States provides that protection.

4.

Aforesaid benevolent trust estate is established by contract and impairment of obligation of contract is further prohibited:

Article 1, Sec. 10, Clause 1, Const. U. S. A.,
which provides:

“No state shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, . . .”

By obligation of the contract is meant the means which at the time of its creation, the law affords for its enforcement:

Nelson v. St. Martin's Parish, 111 U. S. 720;

Walker v. Whitehead, 16 Wall. 314.

In *Edwards v. Kearzey* (96 U. S. 600), the Court said:

“The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in the view of the law ceases to be and falls into the class of those imperfect obligations, as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable.”

In *Farrington v. Tennessee* (95 U. S. 683), the Court said:

“the amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of the court to redress the wrong.”

And the Court held likewise in cases as follows:

Planters Bank v. Sharp, 6 How. 327;

Green v. Biddle, 8 Wheat. 84.

And in the case of *Sturgis v. Crowninshield* (4 Wheat. 197), the Court said:

“Under the Constitution the obligation of a contract is not to be impaired at all. It is not a question of degree, manner, or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force; and any deviation by postponement or acceleration of the period of performance, or imposing conditions not expressed, or dispensing with those expressed, is a violation of the obligation. The slightest variation of the obligation impairs it to that extent and is unconstitutional.”

5.

Another violation of the constitutional rights of complainants which clearly shows in the Second Amended Bill of Complaint is that complainants have been deprived of their lawful rights and that their citizenship rights have been unlawfully abridged by the aforesaid Internal Revenue Agents by unlawful transfers and deliveries of the assets, funds and property belonging to the aforesaid benevolent trust estate to the personal account of William D. Noland [Tr. of Record pp. 51-57], which were made by the said Internal Revenue Agents, then brought additional income taxes against William D. Noland, personally, which said unlawful transfers and deliveries of said properties by the said Internal Revenue

Agents are prohibited by the Constitution of the United States:

Article XIV (14th Amendment), Const. U. S. A., which provides:

“Clause 1. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

Complainants contend they have been denied equal protection of laws.

6.

The “property” protected by the Fourteenth Amendment includes not only the thing owned but the right to acquire, use and dispose of it, and it has been so held:

Buchanan v. Warley, 245 U. S. 60,

and freedom to contract for personal services is a right which is protected by (Clause 1, of the Fourteenth Amendment of the Constitution, U. S. A.) the Supreme law of the land, and it has been so held:

Prudential Ins. Co. v. Cheek, 259 U. S. 530,

and it has been held, that property is land, goods, a business, *skill*, reputation, and whatever may have the effect of destroying property in those things even to a man's good name is destruction of property and a cause for action:

Dixon v. Holden, L. R. 7 Eq. 488, 492 (per Malins, V. C.),

and the right of a citizen to pursue any calling, business or profession he may choose is held to be a property right within the protection of the Court:

New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 Pac. 990 Ann. Cas. 1918C, 1022.

And complainant William D. Noland, personally, contracted with the trustees for the aforesaid benevolent trust estate, a charitable organization, to give his services for the benefit of the beneficiaries, who are poor people and children, without salary, wages or profits, and the said charitable organization to pay his living expenses as an expense to said charitable organization, which said complainant contends that he has a lawful right to do such, as it is so provided in the Constitution of the United States as heretofore cited, and also have cited hereinbefore several outstanding Court rulings which provides likewise supported by the Constitution of the United States, therefore, the aforesaid Internal Revenue Agents in transferring and delivering the assets, funds and property belonging to the said benevolent trust estate, from said charitable organization and estate, to the account of William D. Noland personally, and taxing the said William D. Noland for income tax on said assets, funds and property belonging to the said charitable organization, the said Internal Revenue Agents have violated the provisions herein cited of the Constitution of the United States and the constitutional law and rulings of all the points and authorities herein cited of the Supreme Court and other Courts, which said rulings of said Supreme Court and other Courts are supported by the Constitution of the United States, and the District Court below in the errors herein cited and set forth have likewise violated said provisions herein cited of the Constitution of the United

States, constitutional law and rulings of the Supreme Court and other Courts, in the sustaining of the aforesaid motions for summary judgments made by the defendants, by granting and issuing summary judgments and dismissals of Second Amended Bill of Complaint on April 21, 1948.

7.

A right of action which springs from a contract is property within the protection of the Fourteenth Amendment of the Constitution; and it has been so held:

Lamb v. Powder River, etc. Co., 132 Fed. 434;

Forbes Pioneer Boat Line v. Board of Comrs., 258 U. S. 338.

Aforesaid benevolent trust estate is established by a contract, organized under the common law rights of contract, which is a law that is binding, because of the immemorial usage and universal reception:

Elliot v. Freeman, 220 U. S. 178.

8.

The aforesaid Internal Revenue Agent, Norman Hayward, defendant, by and through threats of warrants for arrest of aforesaid William D. Noland, complainant, the aforesaid trustees books and records were given to the said Internal Revenue Agent, Norman Hayward, defendant, who then reviewed the said trustees books and records, and after reviewing same, unlawfully confiscated, transferred and delivered assets, funds and property belonging to the aforesaid charitable organization to the personal account of William D. Noland personally, and then made taxes from said assets, funds and property against the said William D. Noland personally, and such acts as com-

mitted herein by the said Norman Hayward defendant, are prohibited:

Fourth Amendment to Constitution, U. S. A.,
which said Amendment provides:

“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

And in a leading case (*Boyd v. United States*, 116 U. S. 616) it was held that a compulsory production of private papers to be used as evidence against the owner, is unreasonable search and seizure within this amendment (Fourth Amendment, Constitution U. S. A.), and that an Act of Congress which requires a party to produce his private books and papers, and if he refuses to do so upon demand, permits the Government to assume as true its allegations as to the contents of said books and papers, it is unconstitutional.

This protection reaches all alike, whether accused of a crime or not, and the duty of giving it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws . . . which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for maintenance of such fundamental rights:

Weeks v. United States, 232 U. S. 392;

Article IV, Sec. 1, Const. U. S. A. (Full Faith and Credit Clause).

9.

The importance of the Constitution of the United States is not only important to the people, but also to the United States Government as well, and so held by the Supreme Court:

Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 9.

Constitutional law is the recognized law of the land:

Smyth v. Ames, 169 U. S. 466.

The regulation of power is governed and regulated by common law, and it has been so held:

Munn v. Illinois, 94 U. S. 113,

and unjust discrimination is forbidden:

Wight v. United States, 176 U. S. 512,

and Courts concern themselves in the maintenance of civil rights:

Taylor v. Kercheval, 82 Fed. 497,

and unlawful injury to business or property, or to take away property without due process of law, is a property right that is actionable:

12 C. J. 589, Sec. 114, and cases there cited.

10.

The defendant Harry C. Westover, Collector, is not named individually, the office he occupies is a Government Office, which said office is named, and in order to name that office, as a defendant, it is necessary to name the party who is in charge of said office, therefore, the said office is an agency of the Government, this action is not a personal affair with the said defendant, merely an agency

matter, and under the law of agency, the said Harry C. Westover is a proper party defendant; because the said defendant is a representative of the United States Government, which is an agency and an agent (Story on Agency, Section 3; and Black's Law Dict. 937), and said defendant cannot deny his agency under the law of agency to the injury and prejudice of complainants and appellants hereof (20 Mo. App. 577).

11.

The aforesaid errors of the District Court below as set forth and herein before specified, as shown in the record hereof on appeal, that the said District Court on March 30, 1948, allowed a motion for summary judgment and dismissal made by defendant Harry C. Westover, to lay on the files against an unwritten second amended bill of complaint, said motion supported by a claim of no responsibility for said defendant, and the said District Court allowed a motion for summary judgment and dismissal to lay on the files against an unwritten second amended bill of complaint, after the said Court had given permission to amend said bill of complaint, and the said District Court on April 21, 1948, made and entered a summary judgment and dismissal against second amended bill of complaint in favor of said defendant Harry C. Westover.

And the District Court below, as shown in errors in the record hereof, further on March 30, 1948, allowed a motion for summary judgment and dismissal made by the defendant internal revenue agents other than the defendant Harry C. Westover, to lay on the files against an unwritten second amended bill of complaint, said motion supported by *res adjudicata* and no responsibility for said defendant internal revenue agents, after the said Court had given permission to amend said bill of complaint, and

the said District Court on April 21, 1948, made and entered a summary judgment and dismissal against second amended bill of complaint in favor of said defendant internal revenue agents, therefore, the sustaining of the said motions for summary judgment and dismissal are in error and a denial of constitutional rights and due process of law to complainants, which said denial to complainants is supported by the Constitution of the United States, constitutional law and due process law herein cited within this brief and points and authorities hereof, and likewise the specification of errors, I to VII inclusive, are denials to complainants of their rights as afforded by said Constitution, constitutional law and due process law herein cited.

And on April 19, 1948, complainants filed and served Second Amended Bill of Complaint, which said District Court below had granted leave to do, on March 30, 1948, and on April 19, 1948, the said District Court had a proceeding and rendered the opinion of the said Court, reading into the record of said proceeding the prayer of the first amended complaint which was filed on July 7, 1947, in support of summary judgments and dismissals made by the said District Court and entered on April 21, 1948, in favor of aforesaid defendants; the Court is in error in not reading the prayer of second amended bill of complaint, which the said Court had granted leave to amend and file same, and said error by the said Court, is a denial of rights to complainants hereof afforded by the Constitution of the United States, constitutional law and due process law as cited in this brief and points and authorities herein, and the law further provides:

In the matter herein before the Court, the record shows, that complainants have been deprived of their constitu-

tional rights and due process of law, which is in violation of the rights afforded by the Constitution of the United States and Constitutional Law:

Article XIV (Fourteenth Amendment) Sec. 1,
Constitution U. S. A., and

See:

Cooley's Constitutional Limitations, 4th Ed. 56
(45).

And complainants hereof, William D. Noland, Trustee, and William D. Noland, personal, representing personal interests as two parties, and not being an attorney or lawyer who makes the practice of law a profession and business, the said complainants can make mistake of fact unintentional, and under such circumstances, it is not beyond the reach of the Court, to instruct for correction and grant relief, as complainants have no funds to employ counsel, and have to appear *in propria persona* in Court and prosecute this action to the best of complainants' ability:

Swedesboro Loan, etc., Assoc. v. Gans, 65 N. J.
Eq. 132, 55 Atl. 82,

and a mistake at law is not beyond the reach of the Court for relief (6 Wheat. 174, 5 L. Ed. 589), and the Court will correct the mistake (*Hunt v. Adm'rs.*, 1 Pet. (U. S.) 13), and no one is allowed to enrich himself by a mistake at law or of fact:

Benson v. Bunting, 127 Cal. 532, 59 Pac. 991, 78
Am. S. R. 81,

and the Court has power to correct what has been wrongfully done:

Arkadelphia Mill Co. v. St. Louis So. Western
249 U. S. 134,

and the complaint alleges and shows fraud, that fraud has been used in transfers and deliveries of assets, funds and property, and the courts have jurisdiction to relieve in all cases of fraud:

Tyler v. Savage, 143 U. S. 79 (12 Sup. Ct. 340),
36 L. Ed. 82.

It is the duty of a Federal Court to support every right guaranteed by the Federal and State Constitution:

Snypp v. St. of Ohio, 70 Fed. 2d 535,

and any law or procedure in its operation, denying or obstructing contract rights, impairs contract obligations:

McCracken v. Hayward, 2 How. 608;

Smith v. Morse, 2 Cal. 500.

Complainants contend that when the aforesaid defendant Norman Hayward by threats and duress procured the trustees records and books and examined said records and books and then transferred and delivered assets, funds and property, in the form of figures, to the personal account of William D. Noland personally from the aforesaid charitable organization and benevolent trust estate, it was an act of fraud on the part of said defendant, and any judgment obtained by fraud can be assailed, and the fact of being a party does not estop from relief against fraud:

Johnson v. Waters, 111 U. S. 640, 28 L. Ed. 547,
556.

Courts are not at liberty to decide a cause contrary to the provisions of the Constitution of the United States. (See, Cooley's Constitutional Limitations, and cases cited, p. 159 *et seq.*)

Conclusion.

Appellants respectfully submit the evidence in the Transcript of Record on appeal hereof, showing the proceedings and matters before the District Court below, all of which shows that appellants have been deprived of constitutional, property and personal rights without due process of law, as afforded by the Constitution of the United States.

Wherefore, this appeal is respectfully submitted, and appellants pray that the orders and judgments made and entered on April 21, 1948, in favor of all defendants, be reversed and remanded to the District Court below, for further hearing and proceedings subject to the prayer of the Second Amended Bill of Complaint [Tr. of Record pp. 33-34], which said Second Amended Bill has had no hearing before the District Court below, which is shown hereof.

Dated: Los Angeles, California, October 1, 1948.

Respectfully submitted,

WILLIAM D. NOLAND, Trustee,
In Propria Persona,

WILLIAM D. NOLAND, Personal,
In Propria Persona.

No. 11978.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM D. NOLAND, Trustee, and WILLIAM D. NOLAND,
Personal,

Appellant,

vs.

HARRY C. WESTOVER, Collector, United States Treasury
Department, Internal Revenue Service, Sixth Collection
District of California, Los Angeles Division, *et al.*,

Appellees.

Appeal From the District Court of the United States
for the Southern District of California.

BRIEF FOR THE APPELLEES.

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FILED

NOV 16 1948

PAUL P. O'BRIEN, -
CLERK

TOPICAL INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	3
Summary of argument.....	8
Argument	9

I.

The District Court was without jurisdiction over an action for declaratory judgment with respect to federal taxes.....	9
--	---

II.

The District Court was without jurisdiction over an action to enjoin collection of federal taxes.....	9
---	---

III.

The District Court properly denied refund of any taxes paid....	10
---	----

IV.

Malice by Government officers in performing their duties does not create a cause of action.....	12
---	----

V.

The claim against the revenue agents is res judicata.....	13
Conclusion	14

TABLE OF AUTHORITIES CITED

CASES	PAGE
Adler v. Nicholas, 166 F. 2d 674.....	9
Angelus Milling Co. v. Commissioner, 325 U. S. 293.....	11
Bemis Bros. Bag Co. v. United States, 289 U. S. 288.....	11
Commissioner v. Sunnen, 333 U. S. 591.....	13
Cooper v. O'Connor, 99 F. 2d 135; cert. den. 305 U. S. 643.....	12
Helvering v. Stuart, 317 U. S. 154.....	12
Laughlin v. Rosenman, 163 F. 2d 838.....	12
Real Estate Land Title Co. v. United States, 309 U. S. 13.....	11
Red Star Yeast & Products Co. v. La Budda, 83 F. 2d 394.....	9
Smietanka v. Indiana Steel Co., 257 U. S. 1.....	11
Spalding v. Vilas, 161 F. 2d 483.....	12
United States v. Kales, 314 U. S. 186.....	12
Williamson v. Commissioner, 132 F. 2d 489.....	12
Wilson v. Wilson, 141 F. 2d 599.....	9

STATUTES

California Civil Code (1937), Sec. 2268.....	11
Internal Revenue Code:	
Sec. 23 (26 U. S. C., 1946 Ed., Sec. 23).....	6
Sec. 120 (26 U. S. C., 1946 Ed., Sec. 120).....	6
Sec. 167 (26 U. S. C., 1946 Ed., Sec. 167).....	5, 6, 12
Sec. 322 (26 U. S. C., 1946 Ed., Sec. 322).....	2, 10, 11
Sec. 3653 (26 U. S. C., 1946 Ed., Sec. 3653).....	9
Sec. 3772 (26 U. S. C., 1946 Ed., Sec. 3772)	2, 10
United States Code, Title 28, Sec. 2201.....	2, 9
United States Code, Title 28, Sec. 1291.....	2, 9

MISCELLANEOUS

Treasury Regulations 111, Sec. 29.322-3.....	11
--	----

INDEX TO APPENDICES

	PAGE
Appendix "A"	1
Internal Revenue Code, Sec. 167 (26 U. S. C., 1946 Ed., Sec. 167)	1
Internal Revenue Code, Sec. 322 (26 U. S. C., 1946 Ed., Sec. 322)	2
Internal Revenue Code, Sec. 3653 (26 U. S. C., 1946 Ed., Sec. 3653)	2
Internal Revenue Code, Sec. 3772 (26 U. S. C., 1946 Ed., Sec. 3772)	3
Internal Revenue Code, Sec. 2201 (28 U. S. C.).....	3
Appendix "B"	4
Affidavit in Support of Second Amended Bill of Complaint....	4
Claims for refund (marked Exhibit I for identification in support of Second Amended Bill of Complaint).....	6

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Department, Internal Revenue Service, Sixth Collection
District of California, Los Angeles Division, *et al.*,

Appellees.

Appeal From the District Court of the United States
for the Southern District of California.

BRIEF FOR THE APPELLEES.

Opinion Below.

The District Court wrote no opinion.

Jurisdiction.

This is an appeal by the plaintiff-appellant from a judgment of the United States District Court for the Southern District of California awarding summary judgment to the defendant-appellees. The second amended complaint involved federal income taxes paid and due for the years from 1937 through 1947. [R. 13-34.] The Prayer for judgment requested only declaratory relief. [R. 33-34.] The courts of the United States have no

jurisdiction to grant declaratory judgments with respect to federal taxes. 28 U. S. C., Sec. 2201 [Appendix A, *infra*]. It is believed that the District Court had no jurisdiction. In so far as there may be read into the complaint a request for injunction, the District Court had no jurisdiction over this action either. Internal Revenue Code, Section 3653(a) [Appendix A, *infra*]. And in so far as the complaint may be construed to be an action for refund of taxes paid, no claims for refund were alleged to have been filed by the appellant with the Commissioner of Internal Revenue according to the provisions of law in that regard, which claims are required before a suit may be maintained in any court for the recovery of any internal revenue taxes. Internal Revenue Code, Sections 322(b) and 3772(a)(1) [Appendix A, *infra*]. The judgment of the District Court was entered April 21, 1948. [R. 81-85.]

Notice of appeal was filed May 4, 1948. [R. 91-92.] The jurisdiction of this Court is conferred by 28 U. S. C., Sec. 1291.

Questions Presented.

1. Did the District Court have jurisdiction over an action for declaratory relief or for an injunction?
2. Did the District Court properly dismiss the complaint where, even if it could be construed as an action for refund of taxes paid, no proper claims for refund were filed by the appellant within the period required by law?
3. May a suit for refund of taxes paid be maintained against those appellees who did not receive the money?

4. Were the income taxes properly demanded from the appellant where the income of a trust which he set up could be used for his personal living expenses?

5. Is the action *res judicata* with respect to the revenue agents?

Statutes Involved.

These will be found in Appendix A, *infra*.

Statement.

On April 19, 1948, there was filed in the United States District Court for the Southern District of California, a second amended complaint¹ in this case in the names of William D. Noland, personally, and William D. Noland, trustee, representing his interest as such trustee in the Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate. [R. 13, 34.] The defendants were Harry C. Westover, Collector of Internal Revenue, George D. Martin, Internal Revenue Agent in Charge of the Los Angeles Division, and Norman Hayward, Raymond B. Sullivan and John H. Cramer, Internal Revenue Agents. [R. 14-15.]

It was alleged that on about June 6, 1942, Hayward demanded from Noland and examined the books and records of the Dr. William D. Noland Trust Estate, Ltd., for the purpose of making a report thereon. [R. 16.] It was then claimed that Hayward "with malice aforethought through and by fraud, fraudulently confiscated, assets, funds and property" belonging to the trust estate from the trustees' books and records and fraudulently

¹This will hereinafter be referred to as the complaint.

transferred them in a schedule to the personal account of William D. Noland for the years 1937, 1938, 1939, 1940, and 1941. [R. 16-17.] Thereafter, according to the complaint, Hayward demanded additional income taxes from Noland and accepted the sum of \$80.45 in payment of the additional taxes, giving Noland a receipt for it. [R. 17-18.]

The complaint also alleged that Revenue Agent in Charge Martin and Revenue Agent Cramer sent a letter dated January 26, 1945, to the Dr. William D. Noland Trust Estate, Ltd., together with a statement showing that property belonging to the trust estate was "fraudulently confiscated and assigned, transferred and delivered to the account of William D. Noland personally," and claimed additional personal income tax of \$656.75 for 1942. [R. 19.] The same letter also contained a notification of additional income tax and penalty due from Noland for 1943 in the sum of \$1,114.86. [R. 19-20.] And after numerous hearings, on or about December 29, 1945, the Commissioner sent the taxpayer, Noland, a notice of tax deficiency in the sum of \$1,245.13 plus a penalty of \$62.26 for the year 1943. [R. 20-21.]

The complaint alleged that the trust estate was conducted and operated as a benevolent charitable organization. [R. 22.] It was stated that contracts had been entered into among three trustees and also between the trustees and William D. Noland as a Doctor of Chiropractic, wherein Noland gave his services without any salary, wages, or profit, for the benefit of poor people. [R. 22.]

According to the complaint the Revenue Agents claimed that under Section 167 of the Internal Revenue Code,

Noland was personally taxable on the entire income of the trust. [R. 23.] But the complainant contended that Section 167 is not applicable because the trust estate is a charitable institution and the beneficiaries, trustee and trustor are not the same. [R. 24.]

The complaint also alleged that the trustees of the Noland Trust Estate paid in error \$35.64 in income taxes for the year 1942 and \$183.36 in income taxes for the year 1945 and that such sums were not due. [R. 26.]

It was also stated that claims were filed with the Internal Revenue Service for the \$35.64 and for \$80.45 on or about March 15, 1946, and the claims have not been affirmed or denied by the Internal Revenue Service. [R. 27.]

It was averred that Noland is not paid salary, wages, or profits by the trust estate but that "his personal living expenses are paid from the funds of the said benevolent trust estate as benevolent trust expense." [R. 27.]

A previous action for damages was brought against the revenue agents. But while it was pending, on December 11, 1946, the trustees of the trust estate received another notice for additional income taxes, penalty and interest due in the sum of \$1,509.48 for 1943, and on March 28, 1947, they received a notice of balance due for 1942 in the sum of \$19.85. [R. 27-28.] On June 29, 1947, complainants received a further notice of additional income taxes, penalty and interest for the year 1943 in the sum of \$1,561.20. It was asserted that the complainant does not owe such taxes. [R. 29.]

The complaint prayed for judgment (1) that Section 167 of the Internal Revenue Code does not apply to the

trust estate nor to Noland; (2) that neither Noland nor the trust estate has to file any income tax returns nor does either owe any income taxes of any kind whatsoever; (3) that the contract between the trust estate and Noland for the latter to give his services without pay is valid and therefore he does not owe any income taxes from salary, wages, or profits; (4) that the trust estate is a charitable organization; (5) that Sections 23(a)(1) and (o)(2) and 120 of the Internal Revenue Code and not Section 167 of the Code apply to the complainants. It also asked for such other relief as the court might deem proper. [R. 33-34.]

A copy of the trust agreement referred to in the complaint was attached as an exhibit to the complaint. [R. 36-48.] The agreement recited that William D. Noland conveyed certain described personal property to William D. Noland, Peggy A. Archer and Audney E. Spillman as trustees of the Dr. William D. Noland Trust Estate, Ltd. [R. 36-40.] The trustees were given authority to conduct any and all kinds of business. [R. 40.] They were authorized to do "any and all things that will be benevolent to poor children, women and men, or organizations who are worthy of benevolent assistance from this estate in the discretion and judgment of the Trustees." [R. 41.] They were authorized to "execute a dissolution at any time." [R. 42.] They might "at any time in their discretion and judgment, pay any and all expenses incurred and accrued in the operation and administration of this estate, from any available resources or funds of this estate." [R. 44.] The purpose of the trust was that of "advancing the welfare and progress of this organization on the interests of this estate, its Trustees,

its Members, also advancing in a scientific manner for the benefit of humanity.” [R. 45.] And no one was given the right “in any manner to embarrass or question the rights of the Trustees to exclusively manage, control, administer, and hold legal title to the trust estate properties and funds of this estate.” [R. 46.]

The defendants each moved for summary judgment. [R. 58, 63.] The motion by the Collector, Harry C. Westover, was supported by his affidavit which stated that he was not in office prior to July 1, 1943, and that he did not collect or receive any taxes or other funds from the complainants or any of them. [R. 62.] The motion of the other appellees, the four revenue agents, was also supported by affidavits. Revenue Agents Martin, Sullivan and Cramer swore that they had never received or collected any taxes or other funds from the complainants or any of them. [R. 73-76.] Revenue Agent Hayward stated in his affidavit that as an accommodation to the appellant, Noland, he delivered, in July, 1942, to the then Collector of Internal Revenue the \$80.45 due from Noland as income taxes for the year 1937 and that he then turned over the Collector’s receipt for the \$80.45 to Noland; and at no time did he collect any other taxes or funds from Noland. [R. 77-78.]

The motions for summary judgment were also supported by the complaint and judgment of dismissal in the earlier action in the same court entitled William D. Noland, H. K. Miller and Harry R. Maxwell, Trustees, Dr. William D. Noland Trust Estate, Ltd., a benevolent trust estate, and William D. Noland, Complainants v. George D. Martin, Norman Hayward, Joseph D. Nunan, Jr., Raymond B. Sullivan and John H. Cramer, Civil Action No.

5716-W. [R. 10-13, 63-68, 98-120.] The complaint in the earlier action (filed August 27, 1946) showed that the allegations in the instant complaint pertaining to the appellees Martin, Hayward, Sullivan and Cramer were essentially the same as those in the earlier action, and the prayer for judgment in the instant case was substantially the same as part of the relief requested in the earlier action. [R. 13-34, 98-115.] The judgment in the earlier action [R. 117-120], dated January 9, 1947, showed that the District Court had dismissed that action against the four named appellees in part on the ground that "the Complaint herein fails to state a claim upon which relief as prayed for in the Complaint or any other relief can be granted against said four defendants or any of them." [R. 119.]

Summary of Argument.

The complaint requested merely declaratory relief. Federal courts have no jurisdiction to grant declaratory judgments in federal tax matters. Even if the action were considered as one seeking an injunction, the federal courts would have no jurisdiction to enjoin collection of federal taxes. Nor would the complaint be sufficient as an action for refund of taxes, since (1) the appellant filed no refund claims within the period required by law; (2) the only claims filed were by a trust which is not the appellant herein; (3) the appellees here sued did not collect the taxes in question, and (4) the complaint shows no reason why the taxes were not properly collected. Mere allegations of malice on the part of the internal revenue agents could not create a claim. And in any event, the action with respect to the revenue agents is *res judicata* because of the previous action.

ARGUMENT.

I.

The District Court Was Without Jurisdiction Over an Action for Declaratory Judgment With Respect to Federal Taxes.

Since the complaint was drawn by a layman we do not insist that its sufficiency be tested by the technical standards expected of a lawyer. Nevertheless, the District Court was correct in granting the appellees' motions for summary judgment.

The only relief specifically requested in the complaint is of a declaratory nature. [R. 33-34.] The law provides, however, that the courts of the United States have no jurisdiction to grant declaratory judgments with respect to federal taxes. 28 U. S. C., Sec. 2201 [Appendix A, *infra*]. (*Red Star Yeast & Products Co. v. La Budde*, 83 F. 2d 394 (C. C. A. 7th); *Wilson v. Wilson*, 141 F. 2d 599 (C. C. A. 4th).)

II.

The District Court Was Without Jurisdiction Over an Action to Enjoin Collection of Federal Taxes.

Construing the action as one for injunction relief because of the request for such other "relief as the court might deem proper" [R. 34], the action was nevertheless properly dismissed because the law provides that no suit for the purpose of restraining the assessment or collection of any federal tax shall be maintained in any court. Internal Revenue Code, Section 3653(a) [Appendix A, *infra*]. (*Wilson v. Wilson*, *supra*; *Adler v. Nicholas*, 166 F. 2d 674 (C. C. A. 10th).)

III.

The District Court Properly Denied Refund of Any Taxes Paid.

Although the prayer for judgment requests no money judgment, even if we construe the request for such other "relief as the court might deem proper" [R. 34] as broad enough to include an action for refund of taxes paid, the District Court still properly dismissed the action.

Section 3772(a) of the Internal Revenue Code [Appendix A, *infra*] provides that no suit shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected until a claim for refund has been duly filed with the Commissioner of Internal Revenue according to the provisions of law in that regard. In the case of income taxes, Section 322(b)(1) of the Internal Revenue Code [Appendix A, *infra*] provides that a claim for refund must be filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, or no refund shall be allowed. The only refund claims alleged by the complaint to have been filed were for \$35.64 and \$80.45, both on March 15, 1946. [R. 27.] Both claims were in the name of the Dr. William D. Noland Trust Estate, by William D. Noland, Trustee.² The \$80.45 claim for refund of 1937 taxes showed on its face that the taxes had been paid on July 6, 1942. The \$35.64

²The claims for refund, though designated as Exhibit I to the complaint, were apparently inadvertently omitted from the printed record before this Court. A motion has been filed by the appellees to have them included in the record and they are set forth in Appendix B to this brief.

claim for refund of 1942 taxes showed that the taxes had been paid "on or before March 15, 1943." Thus there was no showing that the claims had been filed within the three-year period after the filing of the returns for those years or within two years from the time the taxes were paid. Moreover, neither claim stated the grounds alleged in the complaint upon which the trust should receive refund of taxes, a requisite for recovery in an action for tax refund. (Treasury Regulations 111, Section 29.322-3; *Angelus Milling Co. v. Commissioner*, 325 U. S. 293; *Real Estate Land Title Co. v. United States*, 309 U. S. 13; *Bemis Bro. Bag Co. v. United States*, 289 U. S. 288.)

No recovery could of course be had by Noland for any taxes imposed upon him in his individual capacity because he filed no claims for refund. Section 322 of the Internal Revenue Code requires that the taxpayer file the claim. Nor, if the trust paid the taxes and filed the claim, could Noland sue as trustee, "representing his interest as such trustee" [R. 13], since the trust and not he was the taxpayer, and for valid trust action the three trustees were required to act collectively. [R. 37.] See, also, California Civil Code (1937), Section 2268.

Apart from the sufficiency of the two refund claims, no recovery of taxes paid could be had against any of the appellees because none of them received either Noland's or the trust's money. Westover, the Collector, was not yet in office when both the \$80.45 and the \$35.64 were paid. [R. 62, Appendix B, *infra*.] Thus there was no cause of action against him. (*Smietanka v. Indiana Steel*

Co., 257 U. S. 1; *United States v. Kales*, 314 U. S. 186, 199-200.) Revenue Agent Hayward turned over the \$80.45 to the then Collector in July, 1942, acting as agent for Noland. [R. 76-78.] None of the other appellees received any money from either Noland or the trust, nor were they alleged to have done so. [R. 73-76.]

Furthermore, under any view of the nature of the action, on its face the complaint shows that the assessment of income taxes to William D. Noland, the settlor of the trust, with respect to the trust income was proper. The trustees had complete discretion with respect to management, control and expenses of the trust. [R. 44-46.] Included in the trust expenses was Noland's personal living expenses. [R. 27.] Under Section 167(a) and (b) of the Internal Revenue Code [Appendix A, *infra*], he was therefore taxable on the entire income of the trust. (*Helvering v. Stuart*, 317 U. S. 154; *Williamson v. Commissioner*, 132 F. 2d 489 (C. C. A. 7th).)

IV.

Malice by Government Officers in Performing Their Duties Does Not Create a Cause of Action.

The complaint showed no acts by the appellees which could conceivably be wrongful. The allegations with respect to the motives of the defendants and their malice and fraud in performing their duties do not create a cause of action against them since the acts complained of were within the general scope of their duties. (*Spalding v. Vilas*, 161 U. S. 483; *Cooper v. O'Connor*, 99 F. 2d 135 (App. D. C.), certiorari denied, 305 U. S. 643; *Laughlin v. Rosenman*, 163 F. 2d 838 (App. D. C.).)

V.

The Claim Against the Revenue Agents is Res
Judicata.

In addition to all of the foregoing, with insubstantial variation the allegations made against the appellees other than the Collector Westover were made in an earlier action against them brought in the same District Court by the appellant Noland acting in the same dual capacity. And similar relief was asked. The complaint was dismissed on the ground, among others, that it failed to state a claim upon which any kind of relief could be granted. [R. 10-13, 98-120.] As to the appellees, Martin, Hayward, Sullivan and Cramer, therefore, the action is barred as *res judicata*. (*Commissioner v. Sunnen*, 333 U. S. 591.)

Conclusion.

The judgment of the District Court dismissing the complaint and awarding judgment to the appellees should be affirmed.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General,

ELLIS N. SLACK,
ROBERT N. ANDERSON,
PHILIP R. MILLER,

Special Assistants to the Attorney General.

JAMES M. CARTER,
United States Attorney,

E. H. MITCHELL,
Asst. U. S. Attorney,

EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue.

November 17, 1948.

APPENDIX "A."

Internal Revenue Code:

SEC. 167.³ INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) Is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; * * *

* * * * *

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question."

* * * * *

(26 U. S. C. 1946 ed., Sec. 167.)

³Section 167 of the Revenue Act of 1936, Chap. 690, 49 Stat. 1648, and of 1938, Chap. 289, 52 Stat. 447, contains similar language.

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) Limitation on Allowance.—

(1) Period of limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time that tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(26 U. S. C. 1946 ed., Sec. 322.)

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) Tax.—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3653.)

SEC. 3772. SUITS FOR REFUND.

(a) Limitations.—

(1) Claim.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3772.)

28 U. S. C.:

SEC. 2201.—CREATION OF REMEDY.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

APPENDIX "B."

EXHIBIT I.

William D. Noland, Trustee
Dr. William D. Noland Trust Estate, Ltd.,
A Benevolent Trust Estate,
In Propria Persona
2030 Wilshire Blvd., Suite 201-205
Los Angeles 5, Calif.

William D. Noland, Personal,
In Propria Persona,
Same address as above.
FE 9332.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

William D. Noland, Trustee, Dr. William D. Noland Trust Estate, Ltd., a Benevolent Trust Estate, and William D. Noland, Personal, Complainants, vs. Harry C. Westover, Collector, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division, *et al.*, etc. Defendants. Civil Action No. 7315-O'C.

AFFIDAVIT IN SUPPORT OF SECOND AMENDED BILL OF COMPLAINT, EXHIBIT I ATTACHED.

State of California, County of Los Angeles—ss.

William D. Noland, Trustee and William D. Noland, Personal, being first duly sworn, deposes and says:

That the attached copies of claims filed with Internal Revenue Collector are true and correct copies of the original copies of said claims and are marked "EXHIBIT I" for identification, in support of Second Amended Bill of Complaint.

WILLIAM D. NOLAND, Trustee.

William D. Noland, Trustee.

WILLIAM D. NOLAND, Personal.

William D. Noland, Personal.

Subscribed and sworn to before me on this 19th day of April, 1948.

(Seal)

RICHARD M. GOUGH,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires May 18, 1948.

Received Apr. 19, 1948. U. S. Attorney, Los Angeles, Calif.

Form 813

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised April 1940)

Claim to be filed with the Collector where Assessment was made or tax paid.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

Collector's Stamp Date Rec'd, Mar. 15, 1946.

- Refund of Tax Illegally Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate or income taxes).

State of California, County of Los Angeles—ss.

Type or Print

Name of taxpayer or purchaser of stamps, Dr. William D. Noland Trust Estate, Ltd.

Business address, 3944 Wilshire Blvd., Los Angeles 6, Calif.

Residence, 3944 Wilshire Blvd., Los Angeles 6, Calif.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, Los Angeles, Calif.

2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1937, to Dec. 31, 1937.

3. Character of assessment or tax, Income Tax.

4. Amount of assessment, \$80.45; dates of payment July 6th, 1942 (see note attached).

5. Date stamps were purchased from the Government

6. Amount to be refunded, \$80.45 \$80.45

7. Amount to be abated (not applicable to income or estate taxes)

8. The time within which this claim may be legally filed expires, under Section of the Revenue Act of 19....., on March 15, 1946.

The deponent, verily believes that this claim should be allowed for the following reasons:

Excerpt from letter dated, January 3, 1946, to Dr. William D. Noland, Trust Estate, Ltd., from Internal Revenue Agent in Charge, reads as follows:—"Inasmuch as there is not provision in the Internal Revenue Code whereby the amount of income tax paid by a trust may be allowed as a credit against the income tax liability of an individual it is suggested that you file appropriate claims for refund for the taxable years mentioned, within the time prescribed by law, on the enclosed Forms 843. This action should be taken in order to protect your interests in the matter in the event that a petition,

if filed, to the Tax Court of the United States results in a decision adverse to your contentions.

Very truly yours,

(See note attached) George D. Martin
Internal Revenue Agent in Charge.

(Attach letter-sized sheets if space is not sufficient)

Sworn to and subscribed before me this 14th day of March, 1946.

 EDITH W. OLMSTEAD,
(Seal) Notary Public.

(Signed): Dr. William D. Noland Trust Estate, Ltd.
By WILLIAM D. NOLAND, Trustee.
William D. Noland, Trustee.

Form 843

Treasury Department, Internal Revenue Service (Revised April, 1940).

Claim to be filed with the Collector where assessment was made or tax paid.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

Collector's Stamp (Date Rec'd) Mar. 15, 1946.

—Refund of Tax Illegally Collected.

—Refund of Amount Paid for Stamps Unused or Used in Error or Excess.

—Abatement of Tax Assessed (not applicable to estate of income taxes).

State of California, County of Los Angeles—ss.

Type or Print

Name of Taxpayer or purchaser of stamps, Dr. William D. Noland Trust Estate, Ltd.

Business address, 3944 Wilshire Blvd., Los Angeles 5, Calif.

Residence, 3944 Wilshire Blvd., Los Angeles 5, Calif.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, Los Angeles, California.

2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1942 to Dec. 31, 1942.

3. Character of assessment or tax, Income Tax.

4. Amount of assessment, \$35.64; dates of payment on or before March 15, 1943.

5. Date stamps were purchased from the Government

6. Amount to be refunded \$35.64 \$35.64.

7. Amount to be abated (not applicable to income or estates taxes).

8. The time within which this claim may be legally filed expires, under Section of the Revenue Act of 19...., on March 15, 1946.

The deponent verily believes that this claim should be allowed for the following reasons:

Excerpt from the letter dated, January 3, 1946, to Dr. William D. Noland Trust Estate, Ltd., from Internal Revenue Agent in Charge, reads as follows:—"Inasmuch as there is no provision in the Internal Revenue Code whereby the amount of income tax paid by a trust may be allowed as a credit against the income tax liability of an individual it is suggested that you file appropriate claims for refund for the taxable years mentioned, within the time prescribed by law, on the enclosed Forms 843. This action should be taken in order to protect your inter-

ests in the matter in the event that a petition, if filed, to the Tax Court of the United States results in a decision adverse to your contentions.

Very truly yours,

George D. Martin,
Internal Revenue Agent in Charge.

(Attach letter-size sheets if space is not sufficient)

Sworn to and subscribed before me this 14th day of March, 1946.

(Seal)

Edith W. Olmstead,
Notary Public.

(Signed): Dr. William D. Noland Trust Estate, Ltd.

By WILLIAM D. NOLAND, Trustee.

William D. Noland, Trustee.

No. 11978.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM D. NOLAND, Trustee, and WILLIAM D. NOLAND, Personal,

Appellants,

vs.

HARRY C. WESTOVER, Collector, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division, *et al.*,

Appellees.

Appeal From the District Court of the United States
for the Southern District of California,
Central Division

Reply Brief of Appellants in Opposition and Answer
to Brief for the Appellees.

WILLIAM D. NOLAND,
Trustee,

WILLIAM D. NOLAND,
Personal,

In Propria Persona.

2030 Wilshire Boulevard, Los Angeles 5,

NOV 24 1948

TABLE OF AUTHORITIES CITED

CASES.	PAGE
Anderson v. Commercial Credit Co., 101 P. 2d 367, 110 Mont. 333	7
Bearsley v. Cunningham, 103 S. W. 2d 18.....	6
Boyd v. United States, 116 U. S. 616.....	4
Chicago, M. & St. P. R. Co. v. Bd. of R. Com., 76 Mont. 305.....	7
Cummings v. Missouri, 71 U. S. 277.....	6
Gibbons v. Ogden, 9 Wheat. 1.....	6
Hey Sing Yeck v. Anderson, 2 Cal. Unrep. 76.....	6
Houston, etc. R. Co. v. Texas, 177 U. S. 66.....	6
Modern Loan Co. v. Pol. Ct., 12 Cal. App. 582.....	5
Moffat v. Hecker, 68 Cal. App. 35.....	5
People v. Gen. Motor Accept. Corp., 84 Cal. 41.....	5
Pleasant v. Aetna Life Ins. Co., 138 U. S. 67.....	6
Stuart v. Palmer, 74 N. Y. 183.....	7
Weeks v. United States, 232 U. S. 392.....	4
Wilkes County v. Color, 180 U. S. 506.....	6

STATUTES

35 Statutes at Large 1092.....	5
United States Code, Title 28, Sec. 2201.....	2
United States Criminal Code, Title 18, Chap. 3, Sec. 20.....	4

No. 11978.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM D. NOLAND, Trustee, and WILLIAM D. NOLAND, Personal,

Appellants,

vs.

HARRY C. WESTOVER, Collector, United States Treasury Department, Internal Revenue Service, Sixth Collection District of California, Los Angeles Division, *et al.*,

Appellees.

Reply Brief of Appellants in Opposition and Answer to Brief for the Appellees.

Argument.

Counsel for the defendants and appellees, states: "The District Court wrote no opinion," in the brief for appellees.

Appellants contend, that at Los Angeles, California, on or about Tuesday, March 30, 1948, the District Court below, held a hearing and proceeding [Tr. of Rec. pp. 128-189], and on or about April 19, 1948, the District Court below, held another proceeding, wherein the court made a lengthy written statement, which appellants construe and contend is an opinion of the court, due to the fact, that the court made, issued and entered judgments based upon said proceedings and statement [Tr. of Rec.

pp. 189-195], and the summary judgments were issued and entered by the District Court below, on or about April 21, 1948 [Tr. of Rec. pp. 81-85].

Counsel for the defendants states in reply brief to appellants' brief in support of transcript of record, and second amended bill of complaint, that courts of the United States have no jurisdiction to grant declaratory relief, with respect to federal taxes, and cites 28 U. S. C., Sec. 2201 (Appendix A, *infra*), and further cites that the District Court had no jurisdiction as there may be read into the complaint a request for injunction etc., and appellants contend that while counsel has mentioned the second amended complaint, but, that his pleadings in relation to jurisdiction of either the District Court below or the Appellate Court hereof, following his mentioning the second amended complaint, apply to the complaint in case No. 5716-W, before the Honorable Judge Weinberger in the District Court below [Tr. of Rec. pp. 98-115], filed August 28, 1946, and dismissed with judgment entered January 9, 1947 [Tr. of Rec. pp. 10-13].

Appellants contend that the second amended complaint, filed April 19, 1948,, case No. 7315-O'C, in the District Court below [Tr. of Rec. pp. 13-34], has had no hearing before the District Court below, which contention is supported by the record hereof in a proceeding held on April 19, 1948, before said District Court [Tr. of Rec. pp. 189-195], and appellants construe and contend the said proceedings on April 19, 1948, is a written opinion of the District Court below.

Appellants further contend that on this appeal to the above entitled Appellate Court, that a charitable organization [Tr. of Rec. pp. 36-49], or any part, parcel or

interest in same, is not subject to the statutes, points and authorities, such as cited by counsel for the defendants, and further that the second amended bill of complaint, case No. 7315-O'C, in the District Court below, has had no hearing in the said District Court, which appellants contend is the main question before the above Appellate Court, because the said District Court gave an order to amend the bill, and then ruled against the second amended bill of complaint without a hearing before said District Court, and appellants believe that on April 19, 1948, the said District Court held this hearing in the morning [Tr. of Rec. pp. 189-195], and appellants served and filed the second amended bill of complaint in the afternoon of said date, April 19, 1948, therefore, no hearing has been held before the said Court below, on the said second amended bill of complaint, consequently, appellants have been deprived of their day in court.

In the District Court below, case No. 5716-W, was an action against the individual revenue agents for damages against them as individuals, and in the said District Court below, case No. 7315-O'C, was an action against the United States Government through its agencies of the Internal Revenue Service, which said actions were entirely different actions, therefore, a principle of *res adjudicata* could not apply or be used against the afore-said two actions by the appellants hereof, in the said District Court.

Counsel for the defendants claims, the complaint showed no acts by the appellees which could conceivably be wrong; the complaint shows that the Internal Revenue Agent, Norman Hayward, demanded the trustees books and records by threats of jail for the trustees of

the charitable organization, if the said books and records of the said trustees were not given to him, and upon such threats the said Internal Revenue Agent procured the said books and records, and made transfers of assets, funds and property from said charitable organization to the personal account of William D. Noland, an appellant hereof, for the purpose of additional income taxation. Counsel for the defendants has in the brief filed herein, overlooked the fact that the Constitution of the United States, also has some provisions, which provide as follows:

Boyd v. United States, 116 U. S. 616;

Weeks v. United States, 232 U. S. 392,

and what the court said in both of said cases is set forth on page 30 of the brief filed by appellants in support of record herein.

And the Constitution of the United States further supports federal laws which provide that the aforesaid Internal Revenue Agent Hayward, a defendant, and other Internal Revenue Agents as defendants, and said defendants are appellees hereof, could be wrong and are wrong, as complained against in all complaints in the record hereof, by the appellants hereof, because said Internal Revenue Agents have violated federal laws as follows (United States Code):

Title 18, Chap. 3, U. S. Criminal Code, Sec. 20,

which provides for the prohibition with penalties for depriving citizens of civil rights; and appellants are citizens and surely have been deprived of civil rights.

And whoever, under color or any law, statute, ordinance, regulation or custom, wilfully subjects an inhabitant of any state, territory or district, to the deprivation of any rights, privileges or immunities secured or protected by the Constitution and laws of the United States, * * * shall be fined not more than \$1,000.00 or imprisoned not more than one year or both.

35 Stat. at Large 1092.

And it further provided, that the owner of a right, must be afforded the opportunity to be heard before property is taken where not dangerous to public welfare (the appellants were not afforded that opportunity when the aforesaid Internal Revenue Agents took property, assets and funds from the aforesaid benevolent trust estate, a charitable organization, by threats of jail, and transferred to appellants herein, without appellants' consent, and neither were the appellants afforded that opportunity to be heard, when the second amended complaint had no hearing before the District Court below, when the said District Court made and entered summary judgments of dismissal on April 21, 1948) and courts have provided that the only way to take property is by a lawful hearing before a court:

Modern Loan Co. v. Pol. Ct., 12 Cal. App. 582;

Moffat v. Hecker, 68 Cal. App. 35;

People v. Gen. Motor Accept. Corp., 84 Cal. Dec. 41.

And the impairment of contracts may not be accomplished by judicial decisions or by legislative enactments

(and contracts under the provision of the Constitution of the United States are involved in this action):

Pleasant v. Aetna Life Ins. Co., 138 U. S. 67;

Houston, etc. R. Co. v. Texas, 177 U. S. 66;

Wilkes County v. Color, 180 U. S. 506.

And the general theory of our constitutional form of government upon which our political institutions rest, is that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law:

Cummings v. Missouri, 71 U. S. 277,

quoted by McKinney, J., in

Bearsley v. Cunningham, 103 S. W. 2d 18, Tenn. 1937.

And Chief Justice John Marshall, of the U. S. Supreme Court, said, in the case of:

Gibbons v. Ogden, 9 Wheat. 1 (often quoted direct by courts):

“As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said.”

Forfeiture of property or property rights without a trial is not a due process of law procedure, unless provided by contract to such effect:

Hey Sing Yeck v. Anderson, 2 Cal. Unrep. 76-78.

In relation to the consideration courts have given the due process of law provision, in the case of *Stuart v. Palmer*, 74 N. Y. 183, an oft quoted case, that court said that the due process of law provisions

“is the most important guaranty of personal rights to be found in the federal or state constitutions. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the Legislation cannot do nor authorize to be done.”

Due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life liberty, or property whether the proceeding be judicial, administrative, or executive in its nature:

Chicago, M. & St. P. R. Co. v. Bd. of R. Com.,
76 Mont. 305,

quoted by Arnold, J., in

Anderson v. Commercial Credit Co., 101 P. 2d
367, 110 Mont. 333 (1940),

and appellants were denied due process of law, by the aforesaid Internal Revenue Agents taking assets, funds and property from the aforesaid benevolent trust estate, a charitable organization, and charging same to the personal account of appellant William D. Noland personally, and further denied due process of law, by the District Court below making and entering summary judgments against appellants without any hearing on the second amended bill of complaint.

Conclusion.

Wherefore, appellants further pray that the judgments of the District Court below be reversed and that the second amended bill of complaint be remanded and sent back to the said District Court below for further proceedings subject to prayer of said complaint.

Dated: Los Angeles, California, November 15, 1948.

Respectfully submitted,

WILLIAM D. NOLAND,
Trustee,

WILLIAM D. NOLAND,
Personal,

In Propria Persona.

No. 11,978

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM D. NOLAND, Trustee, and WILLIAM D. NOLAND,
Personal,

Appellants,

vs.

HARRY C. WESTOVER, Collector, United States Treasury
Department, Internal Revenue Service, Sixth Collection
District of California, Los Angeles Division, *et al.*,

Appellees.

PETITION FOR REHEARING.

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

MAR - 3 1949

PAUL P. O'BRIEN,
CLERK

WILLIAM D. NOLAND, Trustee,
In Propria Persona.

WILLIAM D. NOLAND, Personal,
In Propria Persona.

2030 Wilshire Boulevard, Los Angeles 5,

No. 11,978

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM D. NOLAND, Trustee, and WILLIAM D. NOLAND,
Personal,

Appellants,

vs.

HARRY C. WESTOVER, Collector, United States Treasury
Department, Internal Revenue Service, Sixth Collection
District of California, Los Angeles Division, *et al.*,

Appellees.

PETITION FOR REHEARING.

*To the Honorable Chief Justice and Honorable Associate
Justices of the Circuit Court of Appeals for the Ninth
Circuit:*

Comes now the appellants William D. Noland, Trustee,
and William D. Noland, personal, and respectfully petitions
the above entitled Honorable Court of Appeals for a
rehearing on the above entitled matter upon the grounds
that the second amended bill of complaint [Tr. of Record
pp. 13-34], for which said amendment an order was made
by the District Court below [Tr. p. Record p. 185], said
second amended bill has had no hearing, and the said
second amended bill of complaint is entitled to a day in
court which it has not had, therefore appellants contend

that in filing and serving this petition for a rehearing that a hearing and ruling should be made on said second amended bill of complaint.

This petition is filed pursuant to Rule 25, governing petitions for rehearing in above entitled Court of Appeals.

Wherefore, appellants respectfully pray that the above entitled Court of Appeals will grant this petition for a rehearing.

Dated: Los Angeles, California, March 2, 1949.

Respectfully submitted,

WILLIAM D. NOLAND, Trustee,
In Propria Persona.

WILLIAM D. NOLAND, Personal,
In Propria Persona.

State of California, County of Los Angeles—ss.

William D. Noland, Trustee, and William D. Noland, Personal, being first duly sworn, deposes and says: That he is representing his interest as of his personal interest as a trustee, and his personal interest, relative to personal matters in the above entitled Court of Appeals, and are the appellants hereof, and have read the foregoing petition for a rehearing in the above entitled matter, and believes it to be true, except those matters which are based upon information and belief.

WILLIAM D. NOLAND, Trustee.

WILLIAM D. NOLAND, Personal.

Subscribed and sworn to before me this 2nd day of March, 1949.

(Seal)

MARGUERITE F. CRIPPS,

*Notary Public in and for the County of Los Angeles,
State of California.*

My Commission Expires Jan. 3, 1952.

Certificate of Counsel in Support of Petition.

William D. Noland, Trustee, and William D. Noland, Personal, appearing *in propria persona* in the above entitled appeal, hereby states that in his opinion and judgment that this petition for rehearing is well founded and that it is not interposed for delay.

WILLIAM D. NOLAND, Trustee.

WILLIAM D. NOLAND, Personal.

Subscribed and sworn to before me this 2nd day of March, 1949.

(Seal)

MARGUERITE F. CRIPPS,

*Notary Public in and for the County of Los Angeles
State of California.*

My Commission Expires Jan. 3, 1952.

No. 11980

United States
Circuit Court of Appeals
for the Ninth Circuit

WILSON BROS. & CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Upon Petition to Review a Decision of The Tax Court
of the United States

FILED
AUG 18 1948

PAUL P. O'BRIEN

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Admission of Receipt of Service of Copies of Review Documents	53
Answer	28
Appearances	1
Certificate of Clerk to Transcript of Record.....	54
Decision	47
Designation of Contents of Record on Review...	53
Designation of Printing.....	52
Docket Entries	2
Findings of Fact and Opinion.....	30
Opinion	38
Petition for Review of Deficiency Determinations	4
Exhibit A—Notice of Deficiency.....	9
Petition for Review.....	48
Statement of Points.....	50
Stipulation Designating Venue	51

APPEARANCES

For Petitioner:

GEORGE M. NAUS, Esq.,
CHARLES N. WHITEHEAD, C.P.A.,
A. T. MURPHY, C.P.A.

For Respondent:

T. M. MATHER, Esq.

Docket No. 11853

WILSON BROS. & CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1946

Aug. 20—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 21—Copy of petition served on General Counsel.

Aug. 20—Request for hearing at San Francisco, filed by taxpayer. 5/28/46 Granted.

Oct. 9—Answer filed by General Counsel.

Oct. 18—Copy of answer served on taxpayer. (San Francisco, California.)

1947

Mar. 28—Hearing set May 26, 1947—San Francisco, California.

Apr. 23—Notice of filing appearance of A. Thomas Murphy as counsel filed.

May 27—Hearing had before Judge Johnson on merits. Consolidated with No. 11852. Stipulation of facts filed. Briefs due 7/11/47. Reply 8/25/47.

June 23—Transcript of hearing 5/27/47 filed.

July 8—Brief filed by taxpayer. 7/10/47 Copy served.

Aug. 22—Reply brief filed by taxpayer. Copy served.

1948

- Feb. 5—Findings of fact and opinion rendered. Judge Johnson. Decision will be entered under Rule 50. 2/10/48 Copy served.
- Apr. 14—Respondent's computation for entry of decision filed.
- Apr. 22—Hearing set May 12, 1948, on settlement.
- May 7—Consent to settlement filed.
- May 18—Decision entered. Judge Johnson. Div. 10.
- June 30—Stipulation designating venue filed.
- June 30—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, filed by taxpayer.
- June 30—Statement of points filed by taxpayer.
- June 30—Designation of printing record filed by taxpayer.
- June 30—Designation of record filed by taxpayer.
- July 2—Proof of service of filing petition for review, statement of points, designation of record and designation of printing filed. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

Tax Court of the United States

Docket No. 11853

WILSON BROS. & CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW OF DEFICIENCY
DETERMINATIONS

The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols LA:IT:90D:PAK) dated May 29, 1946, and as a basis of its proceeding alleges as follows:

1. The petitioner is a Nevada corporation with its principal office at 1112 Russ Building, San Francisco 4, California. The returns for the period here involved were filed with the Collector for the Sixth District of California, on the calendar year basis.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on May 29, 1946.

3. The taxes in controversy are income taxes and personal holding company surtaxes for the calendar years 1938 to 1942, both inclusive, as follows: [2]

INCOME TAX

Year	Alleged Liability	Assessed	Alleged Deficiency	25% Penalty
1938	\$ 432.68	\$	\$ 432.68	
1939	315.26	.....	315.26	
1940	547.91	249.66	298.25	
1941	573.44	348.57	224.87	
1942	1,353.95	869.08	484.87	\$ 338.49
Totals	\$ 3,223.24	\$1,467.31	\$ 1,755.93	\$ 338.49

PERSONAL HOLDING COMPANY SURTAX

Year	Alleged Liability	Assessed	Alleged Deficiency	25% Penalty
1938	\$ 10,066.65	\$	\$ 10,066.65	\$ 2,516.66
1939	23,494.70	.....	23,494.70	5,873.68
1940	32,019.46	.....	32,019.46	8,004.87
1941	17,763.09	.....	17,763.09	.....
1942	20,152.40	.....	20,152.40	5,038.10
Totals	<u>\$103,496.30</u>	<u>\$</u>	<u>\$103,496.30</u>	<u>\$21,433.31</u>

4. The determination of taxes set forth in the said notice of deficiency is based upon the following errors:

(a) In determining the tax liabilities of petitioner, for both income tax and personal holding company surtax, for each of the years from 1938 to 1942, both inclusive, the Commissioner erroneously disallowed deductions for salaries of F. A. Wilson and W. T. Wilson to the extent of excess over \$3,000.00 per year for each of them, the disallowed excess being in the following amounts:

Year	F. A. Wilson	W. T. Wilson	Total
1938	\$15,000	\$9,000	\$24,000
1939	5,000	5,000	10,000
1940	5,000	5,000	10,000
1941	3,000	3,000	6,000
1942	5,000	5,000	10,000

(b) In determining the tax liabilities of petitioner for personal holding company surtax for each of the years from 1938 to 1942, both inclusive, the Commissioner erroneously disallowed deductions "in connection with the upkeep of certain boats", in computing Title IA and Subchapter A net income, under Section 406(b) of the Revenue Act of 1938 and Section 505(b) of the Internal Revenue Code. [3]

Said disallowed deductions are in the following amounts:

Year	Amount
1938	\$12,459.96
1939	15,094.35
1940	15,028.68
1941	16,166.87
1942	12,898.05

(c) In determining the tax liabilities of petitioner for personal holding company surtax for each of the years from 1938 to 1942, both inclusive, the Commissioner erred in not allowing any dividends paid credit beyond \$12,000.00 in the year 1941 and \$23,500.00 in the year 1942 and a dividend carryover of \$21,414.71 from 1937.

(d) In determining the tax liabilities of petitioner, for both income tax and personal holding company surtax, for each of the years from 1938 to 1942, both inclusive, the Commissioner erroneously disallowed in whole or in part deductions for ordinary and necessary expenses paid or incurred during the taxable year in carrying on business; i.e., specifically, items of salaries, wages, expenses of officers, franchise taxes, automobile sales, fees of attorneys, travel expenses, telephone and telegraph, taxes, depreciation, and the like.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Through the said years 1938 to 1942, both inclusive, and as an ordinary and necessary expense paid or incurred by petitioner in carrying on its business, personal services were actually rendered to petitioner by F. A. Wilson and W. T. Wilson of a

reasonable value not less than the following amounts:

Year	F. A. Wilson	W. T. Wilson	
1938	\$18,000	\$12,000	
1939	8,000	8,000	
1940	8,000	8,000	
1941	6,000	6,000	
1942	8,000	8,000	[4]

(b) Through the said years 1938 to 1942, both inclusive, petitioner incurred expenses in accordance with the tabular statement of amounts set forth in paragraph 4(b) hereinabove, in connection with the upkeep of certain boats. The boats were not operated during those years, but were necessary to the business of petitioner. No rent or other compensation was received for or from them, and none was obtainable, during any of said years; and there was throughout a reasonable expectation that operation of the boats would result in a profit. They were boats theretofore used in the lumber business and suitable therefor, and have never been used for personal pleasure purposes nor suitable therefor.

(c) Petitioner's earnings and profits accumulated after February 28, 1913 (before giving effect to the distributions hereinafter in this sub-paragraph (c) mentioned) were as follows:

Balance, December 31, 1937.....	\$53,711.84
Net decrease 1938.....	2,149.20
Net increase 1939.....	3,826.92
Net decrease 1940.....	1,340.05
Net decrease 1941.....	1,282.72
Net decrease 1942.....	1,193.71

Petitioner was incorporated December 14, 1928. At all times since it has had issued and outstanding only one class of stock, the shares of which have been held equally by F. A. Wilson and W. T. Wilson as the sole stockholders of petitioner. Throughout the years

1938 to 1942, both inclusive, said earnings and profits have been fully distributed in money pro rata to said stockholders through cash withdrawals by them, with no preference to any share of stock as compared with other shares; i.e., each of said stockholders has had thus distributed to him his full one-half of said earnings and profits.

(d) The items of disallowed expenses specifically mentioned in subparagraph 4(d) of this petition were ordinary and necessary expenses paid or incurred during the respective taxable years 1938 to 1942, both inclusive, in carrying on petitioner's business. [5]

Wherefore, the petitioner prays that this court may hear the proceeding and determine that there is no deficiency due from the petitioner for any of the years 1938 to 1942, both inclusive.

/s/ GEORGE M. NAUS,

Attorney.

/s/ CHARLES N. WHITEHEAD,

C.P.A.

Counsel for Petitioner.

Subscribed and sworn to before me this 16th day of August, 1946.

(Seal) /s/ EMMA L. MacHUGH,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires Jan. 15, 1948. [6]
State of California,
City and County of San Francisco—ss.

F. A. Wilson, being duly sworn, says that he is the president of the petitioner above named, and as such

is duly authorized to verify the foregoing petition, that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true.

/s/ F. A. WILSON

Subscribed and sworn to before me this 16th day of August, 1946.

(Seal) /s/ EMMA L. MacHUGH,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires Jan. 15, 1948. [7]

EXHIBIT A

Form 1279

SN-IT-7

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Office of

May 29, 1946

Internal Revenue Agent in Charge

Los Angeles Division

LA:IT:90D:PAK

Wilson Bros. & Co.

5225 Wilshire Boulevard, Room 308

Los Angeles 36, California.

Gentlemen:

You are advised that the determination of your Income tax liability for the taxable years ended December 31, 1938 to 1942, inclusive, discloses a deficiency of \$1,755.93 and \$338.49 in penalty, and that

Exhibit A—(Continued)

the determination of your Personal Holding Company Surtax liability for the taxable years mentioned discloses a deficiency of \$103,496.30, and \$21,433.31 in penalties, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner,

By /s/ GEORGE D. MARTIN,

Internal Revenue Agent in Charge.

Enclosures: Statement, Form of waiver. [8]

Exhibit A—(Continued)

STATEMENT

LA:IT:90D:PAK

Wilson Bros. & Co.

5225 Wilshire Boulevard, Room 308

Los Angeles 36, California

Tax Liability for the Taxable Years Ended

December 31, 1938 to 1942, Inclusive

INCOME TAX

Year	Liability	Assessed	Deficiency	25% Penalty
1938	\$ 432.68	\$	\$ 432.68	
1939	315.26	.....	315.26	
1940	547.91	249.66	298.25	
1941	573.44	348.57	224.87	
1942	1,353.95	869.08	484.87	\$ 338.49
Totals	\$ 3,223.24	\$1,467.31	\$ 1,755.93	\$ 338.49

PERSONAL HOLDING COMPANY SURTAX

1938	\$ 10,066.65	\$	\$ 10,066.65	\$ 2,516.66
1939	23,494.70	.....	23,494.70	5,873.68
1940	32,019.46	.....	32,019.46	8,004.87
1941	17,763.09	.....	17,763.09	.....
1942	20,152.40	.....	20,152.40	5,038.10
Totals	\$103,496.30	\$	\$103,496.30	\$21,433.31

In making this determination of your tax liability, careful consideration has been given to the report of examination dated December 29, 1943, to your protest dated April 14, 1944 and to the statements made at conferences held.

It is held that the deductions for salaries of officers in the years 1938 to 1942, inclusive, were in excess of reasonable amounts for services actually rendered, computed as follows, and these amounts have been added to taxable income as reported: [9]

Exhibit A—(Continued)

1938

Salary of F. A. Wilson, president,
deducted in return\$ 18,000.00

Allowable as reasonable compensation
for services 3,000.00

Excessive deduction now restored to
taxable income \$ 15,000.00

Salary of W. T. Wilson, secretary and
treasurer, as deducted.....\$ 12,000.00

Allowable as reasonable compensation.... 3,000.00

Excessive deduction, restored to
taxable income 9,000.00

Total addition to taxable income on
account of excessive salaries..... \$ 24,000.00

1939

Salary of F. A. Wilson, deducted.....\$ 8,000.00

Allowable 3,000.00

Excessive deduction \$ 5,000.00

Salary of W. T. Wilson, deducted.....\$ 8,000.00

Allowable 3,000.00

Excessive deduction 5,000.00

Total addition to taxable income..... \$ 10,000.00

1940

Salary of F. A. Wilson, deducted.....\$ 8,000.00

Allowable 3,000.00

Excessive deduction \$ 5,000.00

Salary of W. T. Wilson, deducted.....\$ 8,000.00

Allowable 3,000.00

Excessive deduction 5,000.00

Total addition to taxable income..... \$ 10,000.00

1941

Salary of F. A. Wilson, deducted.....\$ 6,000.00

Allowable 3,000.00

Excessive deduction \$ 3,000.00

Salary of W. T. Wilson, deducted.....\$ 6,000.00

Allowable 3,000.00

Excessive deduction 3,000.00

Total addition to taxable income..... \$ 6,000.00

Exhibit A—(Continued)

1942	
Salary of F. A. Wilson, deducted.....	\$ 8,000.00
Allowable	3,000.00
Excessive deduction	\$ 5,000.00
Salary of W. T. Wilson, deducted.....	\$ 8,000.00
Allowable	3,000.00
Excessive deduction	5,000.00
Total addition to taxable income.....	\$ 10,000.00

Expenses incurred in 1938 to 1942, inclusive, in the respective amounts of \$12,459.96, \$15,094.35, \$15,-028.68, \$16,166.87 and \$12,898.05, in connection with the upkeep of certain boats, are not allowed as deductions in computing Title 1A and Subchapter A net income, under Section 406(b) of the Revenue Act of 1938 and Section 505(b) of the Internal Revenue Code.

A dividend carry-over of \$21,414.71 from 1937 is allowable to you as a credit in the determination of Undistributed Title 1A net income subject to surtax for 1938 but no dividend carry-overs are available as credits in the determination of Undistributed Subchapter A net income of the years 1939 to 1942, inclusive. [11]

It is held that you did not file a corporation income tax return for the year 1942 as required by law. Accordingly, a penalty of 25% has been asserted.

Inasmuch as you failed to file personal holding company returns for the taxable years ended December 31, 1938, 1939, 1940 and 1942 within the time prescribed by law 25 per centum of the tax has been added thereto in accordance with the provisions of

Exhibit A—(Continued)

section 291 of the Revenue Act of 1938 and the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, Mr. J. B. Scholefield, 523 West Sixth Street, Los Angeles 14, California, in accordance with the authorization contained in the power of attorney executed by you.

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1938

Net income as disclosed by return (Loss).....(\$ 8156.05)

Unallowable deductions and additional income:

(a) Compensation of officers		
disallowed	\$24,000.00	
(b) Salaries and wages disallowed.....	300.00	
(c) Rent disallowed	370.00	
(d) Bad debts disallowed.....	1,295.79	
(e) Federal income tax disallowed.....	52.98	
(f) Excessive depreciation disallowed..	5,043.74	
(g) Personal expense of officers		
disallowed	1,294.33	
(h) Gain on sale of automobile.....	100.00	32,456.84
		<hr/>
Total.....		\$ 24,300.79

Reduction:

(i) Decrease of income from dividends.....	1,224.50
	<hr/>

Net income adjusted.....\$ 23,076.29

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained. [12]

(b) Included in the amount of salaries and wages, \$3,900.00, claimed in your return is the amount of \$300.00 representing a loan to one of your employees. It has been determined that the amount of such loan was not compensation for services rendered by the employee and the deduction claimed is, accordingly, disallowed.

Exhibit A—(Continued)

(c) It has been determined that the correct amount of the deduction for rent is \$1,100.00 instead of the amount, \$1,470.00, claimed in your return, or a decrease of \$370.00.

(d) The deduction claimed for bad debts, representing advances for expenses of the Steamship Svea, is disallowed as not representing a proper deduction under section 23(k) of the Revenue Act of 1938.

(e) Included in the amount of other deductions claimed in item 26 of your return is the amount of federal income tax, \$52.98, paid for the taxable year ended December 31, 1937. The deduction so claimed is disallowed as not representing a proper deduction under section 23(c) of the Revenue Act of 1938.

(f) It has been determined that a reasonable allowance for depreciation for this taxable year, under section 23(1) of the Revenue Act of 1938, is the amount of \$10,275.56, instead of the amount, \$15,319.30, claimed in your return, or a decrease of \$5,043.74.

(g) For the year 1938 there was deducted upon the return \$8,622.72, as general expense. Of this amount, the following items are not allowable since they have been held to be personal expenses of the officers of the company:

Automobile expense	\$ 636.22
Telephone	158.11
Attorney's fees	500.00
	<hr/>
Total addition to taxable income.....	\$1,294.33

(h) During the taxable year you sold an automobile for \$100.00 and the proceeds were credited to

Exhibit A—(Continued)

the asset account on your books. It has been determined that the cost of this automobile had been fully recovered through allowances for depreciation claimed and allowed prior to this taxable year. Accordingly, the amount of [13] gain realized on account of this transaction, \$100.00, is added to your income.

(i) It has been determined that a portion of the income from dividends, shown in item 12 of your return, represents distributions of other than earnings or profits as shown in the following:

Name of payor corporation	Amount included in income	Amount determined as being taxable	Difference
Transamerica Corporation	\$ 839.24	\$	\$ 839.24
Great Northern Iron Ore Company	625.00	264.20	360.80
Kennecott Copper Company	655.99	631.53	24.46
Totals	\$2,120.23	\$895.73	\$1,224.50

The amount of income from dividends shown by your return is decreased by the amount of \$1,224.50.

COMPUTATION OF INCOME TAX

Taxable Year Ended December 31, 1938

Net income adjusted	\$ 23,076.29
Less: Dividends received credit (limited to 85% of net income)	19,614.85
Special class net income.....	\$ 3,461.44
Income tax:	
12½% of \$3,461.44	\$ 432.68
Correct income tax liability.....	\$ 432.68
Income tax assessed:	
Original, account No. 86243.....	.....
Deficiency of income tax.....	\$ 432.68

Exhibit A—(Continued)

COMPUTATION OF PERSONAL HOLDING
COMPANY SURTAX

Taxable Year Ended December 31, 1938

Inasmuch as no personal holding company return was filed for this taxable year your undistributed Title 1A net income and personal holding company surtax has been determined as shown in the following:

Net income for taxable year as determined above.....	\$	23,076.29
Addition:		
(a) Expenses not deductible		12,459.96
Total	\$	35,536.25
Less: Federal income tax as above.....		432.68
Title 1A net income.....	\$	35,103.57
Less: Dividends paid credit.....	\$	
(b) Dividend carryover	21,414.71	21,414.71
Undistributed Title 1A net income.....	\$	13,688.86

EXPLANATION

(a) and (b) These adjustments have been previously explained.

Undistributed Title 1A net income.....	\$	13,688.86
Personal Holding Company Surtax:		
65% of \$ 2,000.00.....	\$	1,300.00
75% of \$11,688.86.....		8,766.65
Correct personal holding company surtax.....	\$	10,066.65
Personal holding company surtax assessed (no return filed).....		
Deficiency of personal holding company surtax.....	\$	10,066.65
25% penalty	\$	2,516.66

Exhibit A—(Continued)

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1939

Net income as disclosed by return (loss).....(\$ 825.61)

Unallowable deductions and additional income:

(a) Compensation of officers

disallowed\$ 10,000.00

(b) Gain on sale of automobile..... 331.50

(c) Excessive depreciation disallowed 4,636.29

(d) Personal expense of officers

disallowed 2,868.05

(e) Franchise taxes disallowed 166.76 18,002.60

Total\$ 17,176.99

Additional deduction:

(f) Decrease of income from dividends..... 363.15

Net income adjusted.....\$ 16,813.84

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained.

(b) During the taxable year you sold an automobile for \$525.00 and credited the proceeds from the sale to the asset account on your books. It has been determined that you realized a gain of \$331.50 on this transaction as shown in the following:

Sale price\$525.00

Cost or basis of automobile.....\$633.80

Less: Depreciation allowed or allowable..... 440.30 193.50

Gain realized\$331.50

The amount of the gain realized from this transaction is added to your income.

(c) It has been determined that a reasonable allowance for depreciation, under section 23(1) of the Internal Revenue Code [16] for this taxable year is the amount of \$10,183.01 instead of the amount, \$14,819.30, claimed in your return, or a decrease of \$4,636.29.

Exhibit A—(Continued)

(d) You deducted a total amount of \$11,874.00 in the return for 1939, as general expense. Of this total, the following amounts are held to be personal expenses of the officers of the company:

Automobile expense	\$1,055.70
Telephone and telegraph.....	319.07
Newspapers	5.20
Travel expense	862.48
Attorney's fees	625.60
	<hr/>
Total addition to taxable income.....	\$2,868.05

(e) In your return a deduction was claimed for additional franchise taxes of prior years in the amount of \$166.76. It has been determined the liability for such taxes did not accrue during this taxable year and the deduction claimed is, accordingly, disallowed.

(f) It has been determined that a portion of the income from dividends, shown in item 12 of your return, represents distributions of other than earnings or profits as shown in the following:

Name of payor corporation	Amount included in income	Amount determined as being taxable	Difference
Transamerica Corporation	\$ 699.37	\$	\$699.37
Great Northern Iron Ore Company	625.00	558.70	66.30
Kennecott Copper Company	749.70	1,152.22	(402.52)
	<hr/>	<hr/>	<hr/>
Total	\$2,074.07	\$1,710.92	\$363.15

The amount of income from dividends shown by your return is decreased by \$363.15. [17]

Exhibit A—(Continued)

COMPUTATION OF INCOME TAX

Taxable Year Ended December 31, 1939

Net income adjusted	\$ 16,813.84
Less: Dividends received credit (limited to 85% of net income)	14,291.76
Special class net income	\$ 2,522.08
Income tax: 12½% of \$2,522.08	\$ 315.26
Correct income tax liability	\$ 315.26
Income tax assessed: Original, account No. 86288 .....	.....
Deficiency of income tax	\$ 315.26

COMPUTATION OF PERSONAL HOLDING
COMPANY SURTAX

Taxable Year Ended December 31, 1939

Inasmuch as no personal holding company return was filed for this taxable year your Undistributed Subchapter A net income and personal holding company surtax has been determined as shown in the following:

Net income for taxable year as above.....	\$ 16,813.84
Add: Expenses not deductible (as previously explained)	15,094.35
Total	\$ 31,908.19
Less: Federal income tax as above.....	315.26
Subchapter A net income	\$ 31,592.93
Undistributed Subchapter A net income	\$ 31,592.93
Personal holding company surtax:	
65% of \$2,000.00	\$ 1,300.00
75% of \$29,592.93	22,194.70
Correct personal holding company surtax liability	\$ 23,494.70
Personal holding company surtax assessed (no return filed) .....	.....
Deficiency of personal holding company surtax	\$ 23,494.70
25% penalty	\$ 5,873.68

Exhibit A—(Continued)

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1940

Net income as disclosed by return.....	\$ 11,207.86	
Unallowable deductions:		
(a) Compensation of officers disallowed	\$ 10,000.00	
(b) Taxes disallowed	2,477.77	
(c) Personal expense of officers disallowed	1,129.21	13,606.98
		<hr/>
Total		\$ 24,814.84
Additional deductions:		
(d) Decrease of income from dividends	\$ 140.96	
(e) Interest expense	35.36	
(f) Additional depreciation	41.16	217.48
		<hr/>
Net income adjusted		\$ 24,597.36

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained.

(b) It has been determined that the correct deduction for taxes for this taxable year, under section 23(c) of the Internal Revenue Code, is \$989.56 instead of the amount, \$3,467.33, [19] claimed in your return, or a decrease of \$2,477.77.

(c) For 1940 you deducted a total amount of \$4,180.39 as general expense. Of this total, the following amounts are held not deductible since they are deemed to be personal expenses of the officers:

Automobile expense	\$ 734.78
Telephone and telegraph	293.52
Travel expense	86.16
Newspapers	14.75

Total addition to taxable income.....	\$1,129.21
---------------------------------------	------------

(d) It has been determined that a portion of the income from dividends, shown in item 12 of your re-

Exhibit A—(Continued)

turn, represents distributions of other than earnings or profits as shown in the following:

Name of payor corporation	Amount included in income	Amount determined as being taxable	Difference
Anglo National Company	\$ 200.00	\$ 58.82	\$141.18
Kennecott Copper Company	1,819.12	1,819.34	(.22)
Total	\$2,019.12	\$1,878.16	\$140.96

The amount of income from dividends shown by your return is decreased by \$140.96.

(e) An additional deduction is allowed for interest expense in the amount of \$35.36.

(f) It has been determined that a reasonable allowance for depreciation for this taxable year, under section 23(1) of the Internal Revenue Code, is the amount of \$10,174.60 instead of the amount, \$10,-133.44, claimed in your return, or an increase of \$41.16. [20]

COMPUTATION OF INCOME TAX

Taxable Year Ended December 31, 1940

Net income adjusted	\$ 24,597.36
Less: Dividends received credit (limited to 85% of net income).....	20,907.76
Normal-tax net income	\$ 3,689.60
Income tax:	
Normal tax—13½% of \$3,689.60.....	\$ 498.10
Defense tax—10% of \$498.10.....	49.81
Correct income tax liability.....	\$ 547.91
Income tax assessed:	
Original, account No. 420259.....	249.66
Deficiency of income tax.....	\$ 298.25

Exhibit A—(Continued)

COMPUTATION OF PERSONAL HOLDING
COMPANY SURTAX

Taxable Year Ended December 31, 1940

Since no personal holding company return was filed for this taxable year your undistributed Subchapter A net income and personal holding company surtax has been determined as shown in the following:

Net income as above.....	\$ 24,597.36
Add: Expenses not deductible (as previously explained)	15,028.68
Total	\$ 39,626.04
Less: Federal income tax.....	547.91
Subchapter A net income.....	\$ 39,078.13
Undistributed Subchapter A net income.....	\$ 39,078.13
Personal holding company surtax:	
65% of \$ 2,000.00.....	\$ 1,300.00
75% of \$37,078.13.....	27,808.60
Total	\$ 29,108.60
Defense tax—10% of \$29,108.60.....	2,910.86

Correct personal holding company surtax liability....\$ 32,019.46
 Personal holding company surtax assessed
 (no return filed)

Deficiency of personal holding company surtax.....\$ 32,019.46
 25% penalty

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1941

Net income as disclosed by return.....	\$ 11,065.85
Unallowable deductions and additional income:	
(a) Compensation of officers disallowed	\$6,000.00
(b) Personal expense of officers disallowed	1,169.23
(c) Income from dividends increased....	87.32
(d) Excessive depreciation	8.82
Total	\$ 7,265.37
Total	\$ 18,331.22
Reduction:	
(e) Decrease of income from sale of rights.....	126.96
Net income adjusted.....	\$ 18,204.26

Exhibit A—(Continued)

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained.

(b) There was deducted in the 1941 return a total amount of \$9,904.04 as general expense. Of this total, the following amounts are disallowed as constituting personal expenses of the officers of the company:

Automobile expense	\$ 850.36
Telephone and telegraph.....	318.87
	<hr/>
Total addition to taxable income.....	\$1,169.23

(c) In computing the amount of income from dividends reported in item 12 of your return you excluded the amount of \$2,659.35 as being the portion of certain dividends not representing distributions of earnings or profits. It has been determined that the correct amount of such dividends, representing a return of capital, is \$2,572.03, or a decrease of \$87.32, as shown in the following:

Name of payor corporation	Amount claimed as nontaxable	Amount determined as nontaxable	Decrease
Great Northern iron Ore Co.	\$ 566.81	\$ 566.80	(.03)
Kennecott Copper Company	492.54	492.57	(.03)
Anglo National Company	1,600.00	1,512.66	87.34
	<hr/>	<hr/>	<hr/>
Totals	\$2,659.35	\$2,572.03	\$87.32

The amount of \$87.32 is added to your income.

(d) It has been determined that a reasonable allowance for depreciation for this taxable year, under section 23(1) of the Internal Revenue Code, is the

Exhibit A—(Continued)

amount of \$10,303.05 instead of the amount, \$10,-311.87, claimed in your return, or a decrease of \$8.82.

(e). In your return you reported a gain of \$128.64 from the sale of rights to purchase stock. It has been determined that the correct amount of gain realized on account of this transaction is \$1.68 or a decrease of \$126.96.

COMPUTATION OF INCOME TAX

Taxable Year Ended December 31, 1941

Net income adjusted	\$ 18,204.26
Less: Dividend received credit (limited to 85% of net income)	15,473.62
Normal-tax net income	\$ 2,730.64
Surtax net income	\$ 2,730.64
Income Tax:	
Normal tax—15% of \$2,730.64	\$409.60
Surtax—6% of \$2,730.64	163.84
Correct income tax liability	\$ 573.44
Income tax assessed: Original, account No. 420153	348.57
Deficiency of income tax	\$ 224.87

COMPUTATION OF PERSONAL HOLDING
COMPANY SURTAX

Taxable Year Ended December 31, 1941

Net income adjusted	\$ 18,204.26
Add: Expenses not deductible (as previously explained)	16,166.87
Total	\$ 34,371.13
Less: Federal income tax	573.44
Subchapter A net income	\$ 33,797.69
Less: Dividends paid credit (as claimed in return)	12,000.00
Undistributed Subchapter A net income	\$ 21,797.69

Exhibit A—(Continued)

Personal holding company surtax:

71½% of \$ 2,000.00.....\$ 1,430.00

82½% of \$19,797.69..... 16,333.09

Correct personal holding company surtax.....\$ 17,763.09

Personal holding company surtax assessed:

Original, account No. 420153.....

Deficiency of personal holding company surtax.....\$ 17,763.09

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1942

Net income as disclosed by return.....\$ 23,175.37

Unallowable deductions:

(a) Compensation of officers

disallowed\$10,000.00

(b) Taxes disallowed 268.18

(c) Personal expense of officers

disallowed 2,289.52

(d) Excessive depreciation 181.36 12,739.06

Total\$ 35,914.43

Additional deduction:

(e) Interest expense 14.53

Net income adjusted\$ 35,899.90

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained.

(b) It has been determined that the correct deduction for taxes, under section 23(c) of the Internal Revenue Code, is the amount of \$740.08 instead of the amount, \$1,008.26, claimed in your return, or a decrease of \$268.18.

(c) Of the total amount of \$9,165.51 deducted in the return filed for 1942, as general expense, the following amounts are held not allowable, since they

Exhibit A—(Continued)

are deemed to be personal expenses of the company's officers:

Automobile expense	\$ 501.24
Telephone and telegraph.....	352.76
Travel expense	175.77
Attorney's fees	1,259.75
	<hr/>
Total addition to taxable income.....	\$2,289.52

(d) It has been determined that a reasonable allowance for depreciation for this taxable year, under section 23(1) of the Internal Revenue Code, is the amount of \$10,130.51 instead of the amount, \$10,-311.87 claimed in your return, or a decrease of \$181.36. [25]

(e) An additional deduction for interest expense is allowed in the amount of \$14.53.

COMPUTATION OF INCOME TAX

Taxable Year Ended December 31, 1942

Net income adjusted	\$ 35,899.90
Less: Dividend received credit (limited to 85% of net income).....	30,514.92
	<hr/>
Normal-tax net income.....	\$ 5,384.98
Surtax net income.....	\$ 5,384.98
Income tax:	
Normal tax:	
15% of \$5,000.00.....	\$750.00
17% of \$ 384.98.....	65.45
	<hr/>
	\$ 815.45
Surtax:	
10% of \$5,384.98.....	538.50
	<hr/>
Correct income tax liability.....	\$ 1,353.95
Income tax assessed: Original, account No. 702350.....	869.08
	<hr/>
Deficiency of income tax.....	\$ 484.87
25% penalty	\$ 338.49

Exhibit A—(Continued)

COMPUTATION OF PERSONAL HOLDING
COMPANY SURTAX

Taxable Year Ended December 31, 1942

Since no personal holding company return was filed for this taxable year your Undistributed Subchapter A net income and personal holding company surtax has been determined as shown in the following:

Net income	\$ 35,899.90
Add: Expenses not deductible (as previously explained)	12,898.05
Total	\$ 48,797.95
Less: Federal income tax.....	1,353.95
Subchapter A net income.....	\$ 47,444.00
Less: Dividends paid credit.....	\$ 23,500.00
Undistributed Subchapter A net income.....	\$ 23,944.00
Personal holding company surtax:	
75% of \$ 2,000.00.....	\$ 1,500.00
85% of \$21,944.00.....	18,652.40
Correct personal holding company surtax liability.....	\$ 20,152.40
Personal holding company surtax assessed (no return filed).....	.....
Deficiency of personal holding company surtax.....	\$ 20,152.40
25% penalty	\$ 5,038.10

[Endorsed]: Filed Aug. 20, 1946. [27]

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P.

Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. (a) to (d), inclusive. Denies that the Commissioner erred in the determination of the deficiencies as alleged in paragraph 4 of the petition and subparagraphs (a) to (d), inclusive, thereunder.

5. (a) Denies the allegation contained in subparagraph (a) of paragraph 5 of the petition.

(b) Admits the boats were not operated; denies the remaining allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Admits that at all times since it has had issued and outstanding only one class of stock, the shares of which have been held equally by F. A. Wilson and W. T. Wilson as the sole stockholders of petitioner; denies the remaining allegations contained [28] in subparagraph (c) of paragraph 5 of the petition.

(d) Denies the allegation contained in subparagraph (d) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's

determination be approved and the petitioner's appeal denied.

/s/ J. P. WENCHEL, TMM
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

T. M. MATHER,
Special Attorney, Bureau of Internal Revenue.

[Endorsed]: Filed Oct. 9, 1946. [29]

The Tax Court of the United States

10 T. C. No. 30

W. T. Wilson, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Wilson Bros. & Co., Petitioner, v. Commissioner of Internal Revenue, Respondent.

Docket Nos. 11852, 11853.

Promulgated February 5, 1948.

1. Two brothers, sole equal shareholders of the taxpayer corporation, contributed to it cash as paid-in surplus in 1931 and orally agreed that either might make withdrawals up to \$150,000. Each did so in succeeding years, making no notes and paying no interest. The withdrawals were carried in an account receivable by the corporation and some deposits by the brothers were later credited to it.

The shareholders' withdrawals, held, on the evidence to be distribution of dividends, and not loans.

2. Amounts paid by the taxpayer corporation to its two shareholding officers, held, on the evidence to be excessive as salaries and deductible as such only to a lesser amount determined.

3. Taxpayer, a trader in securities, borrowed shares from a broker to maintain a "short" position, and paid the lender fees and amounts equivalent to dividends on the shares. Such amounts, held, deductible as expense. *Commissioner v. Wilson*, 163 Fed. (2d) 680; certiorari denied, U. S. [30]

4. The taxpayer corporation owned two lumber schooners which it used in its lumber business in 1929 and "laid up" thereafter, incurring expense in their maintenance but deriving no income from them. In 1938 it discontinued the lumber business, and its assets thereafter consisted principally of securities.

Amounts representing depreciation and maintenance expenses of the schooners, held, not deductible in computing the personal holding company surtax since the evidence fails to establish that no income was obtainable, that the schooners were held in the course of business and that there was a reasonable expectation of profit from the property, as required by section 505 (b), Internal Revenue Code, to support such deduction in the absence of income from the property.

5. Increase in credits for dividends paid, held, proper to the extent that distributions, stipulated or held to be dividends, were made pro rata and

without preference among shareholders. Section 27 (h), Internal Revenue Code.

George M. Naus, Esq., C. N. Whitehead, C.P.A., and A. Thomas Murphy, C.P.A., for the petitioners.

T. M. Mather, Esq., for the respondent.

The Commissioner determined against W. T. Wilson an income tax deficiency of \$18,504.76 for 1939; of \$11,158.19 for 1940, and of \$5,644.55 for 1941, and against Wilson Bros. & Co. deficiencies in income tax, personal holding company surtax and penalties as follows:

Year	Income Tax		Personal Holding Co. Tax	
	Deficiency	Penalty	Deficiency	Penalty
1938	\$432.68	\$	\$10,066.65	\$2,516.66
1939	315.26	.....	23,494.70	5,873.68
1940	298.25	.....	32,019.46	8,044.87
1941	224.87	.....	17,763.09	.....
1942	484.87	338.49	20,152.40	5,038.10

Petitioner Wilson charges the Commissioner with error in treating his withdrawals of funds from the corporation as dividends rather than loans; in treating portions of the amounts paid him as salary by the corporation as dividends and hence not community income, and in disallowing the deduction of amounts paid by him to brokers for the loan of securities in which he held a "short" position. The petitioner corporation charges error in the Commissioner's disallowance as deductions of the full amounts paid as salaries to its two shareholding officers; in the disallowance for personal holding company surtax purposes of the deduction of depreciation and expenses on two unused lumber schooners. It claims further additional credits for

dividends paid and the deduction of certain miscellaneous expenses, the subject of a stipulation.

FINDINGS OF FACT

Petitioner, W. T. Wilson (hereafter called petitioner), an individual residing at Los Angeles, California, filed income tax returns, prepared on the cash basis, for the years 1939, 1940 and 1941 with the collector of internal revenue for the sixth district of California. Petitioner, Wilson Bros. & Co. (hereafter called the corporation), a Nevada corporation with principal office at San Francisco, California, filed income tax returns, prepared on an accrual basis, for the years 1929-1941, inclusive, with the collector for the same district. During the years 1938-1942 the corporation was a personal holding company.

1. The corporation was organized in December 1928 by petitioner and his brother, F. A. Wilson, each of whom paid \$500 for one-half of its capital stock of \$1,000 represented by 40 shares, and thereafter they jointly contributed to paid-in surplus \$624,000 and two schooners. Each has since owned 20 shares. The brothers were successfully engaged as partners in the [32] milling, shipping and selling of lumber on the west coast of the United States. They operated logging camps and sawmills, manufacturing lumber in Washington and shipping it on the two schooners, the Oregon and the Idaho, for sale in San Francisco, Los Angeles and San Diego. The business was begun by their grandfather, continued by their father, and they participated in it

from early youth. After 1928 it was conducted by the corporation. The schooner, Oregon, in which the brothers owned a 100 percent interest, and the schooner, Idaho, in which they owned a 75 percent interest, were transferred to the corporation at a value of \$175,000. As an additional contribution to paid-in surplus the brothers on March 20, 1931, transferred to the corporation a bank account of \$480,372.24, which they had received as a gift from their mother. At the time of this transfer it was orally agreed between them that either might at any time make withdrawals not exceeding \$150,000 from the corporation and repay the amounts without interest when convenient to the drawer or necessary for the corporation's business.

In 1932 petitioner made an initial withdrawal of \$17,717.88, and on January 1, 1939, the balance due from him, as shown on the corporation's books, was \$75,417.88. In 1939 and 1940 he made withdrawals aggregating \$45,000 and \$16,000, respectively, increasing the balance shown as due from him to \$136,417.88. In and after 1938 F. A. Wilson likewise made substantial withdrawals, \$50,000 in 1939 and \$11,000 in 1940. Both have made occasional payments, which were credited to their respective accounts. As of January 2, 1945, the corporation's books showed as due from them on account of withdrawals, \$99,917.88 and \$94,500, respectively. At all times each has been financially able to repay the amount of his withdrawal. No notes were made to evidence an indebtedness, but the debits and credits reflecting withdrawals [33] and payments were car-

ried on the corporation's books in an account receivable. Petitioner's accumulated earnings and profits were at the end of 1938, \$89,420.45; at the end of 1939, \$93,247.38; and at the end of 1940, \$91,907.32, without adjustments for tax deficiencies determined or to be determined. Petitioner's withdrawals were not loans but dividends.

2. With the cash contributions of petitioner and his brother the corporation purchased stocks, principally of domestic corporations. In 1938 and succeeding years its security holdings exceeded \$800,000 in value, and it derived over 80 percent of its income from dividends. F. A. Wilson, its president and general manager, and petitioner, its secretary and treasurer, gave attention to its investments. During the taxable years they followed market reports, made some slight changes in holdings, exercised rights, and once purchased stocks with the proceeds of some matured bonds. F. A. Wilson had charge of maintaining and repairing the two schooners which were not in use; of finances and collections, and the preparation of tax returns. In 1940 he exerted unusual efforts in preparing for the presentation of a tax case by the corporation. He and petitioner were both active in seeking a purchaser or lessor for the schooners, and in 1939 he made an unsuccessful trip to the northwestern states in search of lumber. He was a member of the San Francisco Stock Exchange, and operated a brokerage business. He also looked after his personal security portfolio, containing stocks of a value of about \$200,000. Petitioner kept the cor-

poration's accounts; he also engaged in a retail lumber business at Los Angeles, which he took over from the corporation in 1938 and from which he reported gross income of \$184,000 in 1939, \$127,000 in 1940, and \$187,000 in 1941. He engaged a manager at [34] \$300 a month for this business. In 1938 the corporation ceased to deal in lumber, and its only business was the care of investments and the collection of dividends and a small amount of rent.

Prior to 1936 petitioner and his brother received no salaries from the corporation. In 1936, 1937 and 1938 each received an annual salary of \$12,000, and in 1938 F. A. Wilson was paid a special fee of \$6,000 for his work in connection with the tax litigation. In 1939, 1940 and 1942, each was paid an annual salary of \$8,000 and in 1941 of \$6,000. Petitioner and his wife each reported one-half of this salary for 1939, 1940 and 1941 as community income. A reasonable annual compensation for the services of petitioner and his brother to the corporation during the taxable years was \$6,000 each.

3. During 1939, 1940 and 1941 petitioner was a trader in securities, and to maintain a "short" position, borrowed certain stocks. He paid to the lender brokerage firms amounts equivalent to dividends on the stocks as follows: 1939, \$3,900; 1940, \$4,150; 1941, \$4,400. In addition he paid the lenders \$20 in 1939 and \$339.85 in 1941 as premiums for loan of the stocks. The Commissioner disallowed the deduction of \$3,900 in 1939, \$4,150 in 1940, and

\$4,736 in 1941, treating these amounts as part of the cost of covering purchases.

4. The two schooners, transferred to the corporation, are wooden-hulled boats of 1,800 tons, dead weight, with cargo space for 1,200,000 board feet of lumber. After being operated by the corporation for a part of the year 1929, they were "laid up" because a lull in the lumber market left petitioner with large unsold stocks on hand. For some years thereafter petitioner and [35] his brother expected to put the boats back into service, shipping lumber in them again when market conditions should improve. But in succeeding years such conditions grew worse, and the boats have never been used. They have been kept moored, however, under the care of a watchman who cleans and paints the superstructure, and at intervals of 15 to 18 months they are placed in drydock for general overhauling, caulking and repairs. While not seaworthy since 1929, they have been maintained in such a condition that they could be made so within a period of 60 to 90 days.

In 1938 petitioner took over individually a retail branch of the corporation's business, selling pine to motion picture studios and others from the office and lumber yard which the corporation formerly used. Since that year the corporation has not dealt in lumber or derived any income from its sale. During the years 1938-1942 numerous efforts were made to sell or lease the boats, some offers were received but not accepted. Being of wood the schooners are

inferior to ships having steel hulls and can not be as readily leased or sold. During the war they were not desired by the Maritime Commission because slow and small. For the years 1938-1942 the following amounts were claimed and allowed for income tax purposes as depreciation and expenses connected with them:

Year	Total	Depreciation	Expenses
1938	\$12,459.96	\$10,002.08	\$2,457.88
1939	15,094.35	10,002.08	5,092.27
1940	15,028.68	10,002.08	5,026.60
1941	16,166.87	10,002.08	6,164.79
1942	12,898.05	10,002.08	2,895.97

These amounts were not allowed as deductions in the determination of the corporation's personal holding company surtax. The corporation received no rent or other compensation for the use of the boats in 1938, 1939, 1940, 1941 and 1942; the boats were not held in the course of the corporation's business in those years and were not necessary to the conduct of that business.

OPINION

Johnson, Judge: 1. Petitioner assails the determination that withdrawals of \$47,500 (stipulated, however, to be \$45,000) in 1939 and of \$16,000 in 1940 were dividends paid to him by the corporation and not loans, as he contends. He stresses in support of his view, the informal understanding between his brother and himself when their mother's gift of cash was contributed to paid-in surplus; the charging of the withdrawals to their personal accounts; the crediting of them to the corporation's account receivable, and some repayments made by

each shareholder. By section 115 (a) of the Internal Revenue Code a dividend is defined to be any distribution made by a corporation to its shareholders out of earnings or profits, and by 115 (b) "every distribution is made out of earnings or profits to the extent thereof." Hence petitioner's withdrawals are to be deemed distributions, as determined, unless he can affirmatively establish their character as loans, and since the corporation was wholly owned by the two withdrawers, their control invites a special scrutiny. Ben R. Meyer, 45 B.T.A. 228.

We are of opinion that the evidence indicates dividends rather than loans. While true that the absence of notes, the failure to pay interest and the lack of a written agreement are not of themselves conclusive of this view, it is equally true that the recording of withdrawals in accounts receivable and the credits entered in such accounts are likewise inadequate to establish loans. [37] The issue must be decided upon an examination of all the pertinent facts found, and when they are examined, the emerging picture is that of two brothers, always closely associated in business, who own and completely control a corporation to which they jointly contributed over a million dollars in cash as paid-in surplus and from which they drew money at will, making occasional returns of lesser amounts credited to their accounts. The ceiling for such withdrawals and the obligation to repay them on call, being unevicenced by written agreement or corporate resolution, could have been changed by

an oral understanding between the brothers as easily and as informally as it was made. Such a vague arrangement is not determinative for tax purposes; and as the corporation had earnings and profits in 1939 and 1940, we hold that the withdrawals were dividend distributions to the extent thereof. Ben R. Meyer, *supra*; James J. Gravley, 44 B.T.A. 722; Moses W. Faitoute, 38 B.T.A. 32; Roy J. Kinnear, 36 B.T.A. 153; dismissed (C.C.A., 9th Cir.), 95 Fed. (2d) 997; George P. Marshall, 32 B.T.A. 956; M. Jackson Crispin, 32 B.T.A. 151. Petitioner cites *Weaver v. Commissioner* (C.C.A., 9th Cir.), 58 Fed. (2d) 755, as to the contrary, but we perceive a material distinction in that the \$100,000 which was therein contributed to a corporation by its several shareholders under an oral understanding that it would be returned, was simultaneously repaid to all in the exact amount of each one's contribution.

The Commissioner's determination that the withdrawals were dividends is sustained as to \$45,000 in 1939 and \$16,000 in 1940.

2. The corporation paid \$12,000 to petitioner and \$18,000 to F. A. Wilson in 1938 as salary and so paid to each \$8,000 in 1939, 1940 and 1942, and \$6,000 in 1941. Under the view that the services of each were worth no more than \$3,000 in each year, the Commissioner disallowed to the corporation the [38] deduction of the excess paid above that amount and treated such excess as dividends, not salary, in determining petitioner's tax for each of those years. Both determinations are assailed.

To justify the salary paid, petitioner and his brother testified that each devoted an average of 35 hours a week to business of the corporation. As the corporation ceased to deal in lumber in 1938, such services were limited to care of investments, maintenance of the schooners and efforts to sell or lease them. There is also testimony that a search was made for a lumber supply with which to revive the corporation's lumber business, but this purpose seems hardly consonant with the transfer of its retail business to petitioner in 1938 and efforts to dispose of the schooners which had been used in that business. While the investment portfolio had a market value in excess of \$800,000 during the years in controversy, the witness mentioned in general terms only "slight changes in holdings" and the purchase of stock with the proceeds of some matured bonds. They stressed the need for following market reports closely; work on income tax matters and attention to the schooners (which, however, were not in operation or even seaworthy), and their repeated but unsuccessful efforts to sell or lease them. They also stress that no salaries were paid them prior to 1936, but such prior years are not in controversy.

We are not persuaded that the value and extent of the brothers' services to the corporation were as great as they assert. Petitioner was operating a lumber business of his own on which he reported a gross annual income of from \$127,000 to \$187,000, and F. A. Wilson, a member of the San Francisco Stock Exchange, was operating a brokerage firm.

Under such circumstances it is not reasonable to suppose that their principal activities were connected with [39] affairs of a personal holding company, which held only securities and "laid up" lumber boats, and their testimony confirms rather than rebuts this view. Neither could cite any steady corporate business, but referred vaguely to occasional need for attention to the boats, occasional efforts to sell or lease them, to tax work, and to "slight changes" in investments. On these facts we deem an annual salary of \$6,000 to each reasonable and reverse the Commissioner's determination to this extent. Cf. Wagegro Corporation, 38 B.T.A. 1225.

3. Petitioner was a trader in securities, and having borrowed shares from a broker to maintain a "short" position, he paid the lender \$3,900 in 1939, \$4,150 in 1940, and \$4,400 in 1941, the equivalent of dividends on such shares. He also paid a premium or fee of \$20 in 1939 and \$339.85 in 1941. The Commissioner determined that "amounts of \$3,900.00, or \$4,150.00 and \$4,736.00" paid as dividends on borrowed stock were "not allowable as deductions from gross income, but are held to be a part of the cost of stock purchased to cover the short sales." Petitioner assails this determination as error, and we agree. Amounts so paid "were not incurred as an incident either to the acquisition or sale of the property involved, but are more in the nature of carrying charges incurred during the progress of the deal," and are deductible. Commissioner v. Wiesler (C.C.A., 6th Cir.), 161 Fed.

(2d) 997; affirming 6 T.C. 1148; certiorari denied, U.S., (December 15, 1947); *Commissioner v. Wilson* (C.C.A., 9th Cir.), 163 Fed. (2d) 680; certiorari denied, U.S. (December 15, 1947).

4. In determining the corporation's personal holding company surtax for the years 1938-1942, the Commissioner disallowed as deductions the amounts representing depreciation and expenses connected with the two schooners although such amounts were deducted in his determination of the corporation's income tax. The corporation assails the disallowance and respondent defends his action on the ground that the schooners were not properly of the kind required by section 505 (b), Internal Revenue Code, to support the deduction. This section, defining Subchapter A Net Income for computation of surtax on a personal holding company, limits the deductions available under section 23 (a), relating to expenses, and section 23(1), relating to depreciation, to an amount equal to rent or other compensation from the property affected unless it is established to the Commissioner's satisfaction:

(1) That the rent or other compensation received was the highest obtainable, or, if none was received, that none was obtainable;

(2) That the property was held in the course of a business carried on bona fide for profit; and

(3) Either that there was reasonable expectation that the operation of the property would result in a profit, or that the property was necessary to the conduct of the business.

Since the corporation derived no income what-

and maintenance expense because the boats were not used in a business or transaction for profit. And in our opinion it was the intention of Congress in enacting 505 (b) that the corporation holding them be in no more favorable a position for claiming such deductions. Accordingly we sustain the Commissioner's disallowance.

5. The corporation charges error in that the Commissioner failed to allow credit for dividends paid "beyond \$12,000" in 1941, \$23,500 in 1942 and a dividend carry-over of \$21,414.71 from 1937. Just what additional credits are sought is not clear from the assignment of error, but in a stipulation the Commisisoner "concedes" that the corporation "paid a cash dividend of \$12,000.00 in December 1940, at the rate of \$6,000.00 each to F. A. Wilson and W. T. Wilson." By brief petitioner contends that any parts of the salaries which may be disallowed should likewise be treated as dividends paid, while respondent, advertising to shareholders' withdrawals, which he contended and which we hold to have been dividend distributions, argues that since different amounts were distributed to each shareholder, no additional credit should be given the corporation because the distribution was not pro rata, as required [43] to support a credit by section 27 (h), Internal Revenue Code, and he stresses that this section has been strictly construed. *Safety Convoy Co., Inc. v. Thomas* (C.C.A., 5th Cir.), 139 Fed. (2d) 219. See also *Black Motor Co., Inc. v. Commissioner* (C.C.A., 6th Cir.), 125 Fed. (2d) 977. Obviously the condition is not met

in respect of the withdrawals and the \$6,000 special fee paid to F. A. Wilson in 1938, and no dividends paid credit should be allowed on account of those distributions. *Spring Street Realty Co. v. Commissioner* (C.C.A., 3rd Cir.), 123 Fed. (2d) 146, affirming a Memorandum Opinion entered July 21, 1941. But as the regular salaries paid and the excesses disallowed were equal and therefore proportionate to shareholdings, the amounts of the excesses should be reflected in the credits sought. The same is true of the \$12,000 covered by stipulation.

In addition the parties have stipulated that the corporation is entitled to a number of itemized expense deductions in addition to those allowed by the Commissioner, and these should be reflected in the computation of tax.

Reviewed by the Court.

Decisions will be entered under Rule 50. [44]

The Tax Court of the United States, Washington
Docket No. 11853

WILSON BROS. & CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's findings of fact promulgated February 5, 1948, the respondent herein filed

a computation of tax on April 14, 1948, and the petitioner, on May 7, 1948, filed an acquiescence in the computation as filed by the respondent. Now, therefore, it is

Ordered and Decided: That there are deficiencies in tax as follows:

Year	Income Tax		Personal Holding Co. Surtax	
	Deficiency	25% Penalty	Deficiency	25% Penalty
1938	\$308.56	None	None	None
1939	101.97	None	\$ 8,517.78	\$2,129.45
1940	158.00	None	13,740.74	3,435.19
1941	25.82	None	9,899.35	None
1942	243.06	\$278.04	7,079.22	1,769.80

(Seal) /s/ LUTHER A. JOHNSON,
Judge.

Entered May 18, 1948.

[Endorsed]: June 30, 1948. [45]

In the United States Circuit Court of Appeals for
the Ninth Circuit

Docket No. 11853

WILSON BROS. & CO.,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review,

PETITION FOR REVIEW

To the United States Circuit Court of Appeals for
the Ninth Circuit, and the Honorable Judges
thereof.

Wilson Bros. & Co., a corporation (the above
named Petitioner on Review), hereby petitions the

United States Circuit Court of Appeals for the Ninth Circuit to review the decisions entered May 18, 1948, for the respective years 1938 to 1942, both inclusive, ordering and deciding that there are deficiencies in personal holding company surtaxes for those years, due from this petitioner on review. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code and of your Rule 31.

This petitioner on review filed a personal holding company return for the year 1941 with the Collector of Internal Revenue for the First District of California, whose office is located at San Francisco, California, within the Ninth Judicial circuit, where this review is sought. No personal holding company return was filed for any of the years 1938, 1939, 1940 and 1942. Pursuant to Section 1141(b) (2) of the Internal Revenue Code this petitioner and the [46] Commissioner of Internal Revenue have by stipulation in writing designated the United States Circuit Court of Appeals for the Ninth Circuit as the Court of review under this petition for review.

NATURE OF CONTROVERSY

The question involved is whether petitioner may deduct depreciation and expenses in connection with the lumber boats Idaho and Oregon.

Throughout the five tax years 1938 to 1942, both inclusive, petitioner was the owner of the lumber steamer Oregon and the owner of a 75% interest in the lumber steamer Idaho, both of which steamers

it had laid up in 1929 and not operated thereafter to the end of 1942. The depreciation and expenses of said vessels (claimed and allowed for ordinary income tax purposes) for the five years in question were as follows:

Year	Total	Depreciation	Other Expenses
1938	\$12,459.96	\$10,002.08	\$2,457.88
1939	15,094.35	10,002.08	5,092.27
1940	15,028.68	10,002.08	5,026.60
1941	16,166.87	10,002.08	6,164.79
1942	12,898.05	10,002.08	2,895.97

This petitioner claimed and claims that it may make deductions thereof in computing Title 1A and Subchapter A net income under section 406(b) of the Act of 1938 and corresponding section 505(b) of the Internal Revenue Code. The Commissioner disallowed the deductions and the Tax Court sustained the disallowance and held against deductibility.

/s/ GEO. M. NAUS

Attorney for Petitioner on Review.

[Endorsed]: T.C.U.S. Filed June 30, 1948. [47]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS

Comes now the petitioner on review herein by its attorney of record, and states the points on which it intends to rely on the review herein, to-wit:

The Tax Court of the United States erred in matter of law and its decision was not in accordance with law:

1. In concluding and holding, upon the facts found, that there were deficiencies in personal holding company surtaxes for the years 1938 to 1942, both inclusive.

2. In concluding and holding, upon the facts found, that petitioner's depreciation and expenses in connection with the boats Idaho and Oregon were not deductible.

3. In that its opinion and decisions are, upon the facts found, contrary to law in the matter of personal holding company surtaxes.

/s/ GEO. M. NAUS,

Attorney for Petitioner on Review.

[Endorsed]: T.C.U.S. Filed June 30, 1948. [48]

[Title of Circuit Court of Appeals and Cause.]

STIPULATION DESIGNATING VENUE

Pursuant to Section 1141(b)(2) the Commissioner and the taxpayer hereby designate the United States Circuit Court of Appeals for the Ninth Circuit as the Court to review the decision of The Tax Court entered May 18, 1948 in the above-entitled Docket Number, upon the petition

for review filed, or about to be filed, by the above-named petitioner Wilson Bros. & Co.

Dated June —, 1948.

WILSON BROS. & CO.,
a corporation,

By /s/ F. A. WILSON,
President.

/s/ GEORGE M. NAUS,
Attorney for Petitioner.

COMMISSIONER OF
INTERNAL REVENUE,

By /s/ THERON L. CAUDLE,
Assistant Attorney General, Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed June 30, 1948. [49]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PRINTING

Comes now the petitioner on review herein, by its attorney of record, and pursuant to Rules 19(6) and 31(3) of the Ninth Circuit Court of Appeals, relies upon and designates the entire record certified by the Clerk of the Tax Court, and directs that it be printed under the supervision of the Clerk of the Circuit Court of Appeals as the record on review.

/s/ GEO. M. NAUS,
Attorney for Petitioner on Review.

[Endorsed]: T.C.U.S. Filed June 30, 1948. [50]

[Title of Circuit Court of Appeals and Cause.]

ADMISSION OF RECEIPT OF SERVICE
COPIES OF REVIEW DOCUMENTS

The undersigned counsel for Respondent on Review hereby admit receipt of service copies of the following documents on review:

1. Petition for review.
2. Notice of filing petition for review.
3. Statement of points.
4. Designation of contents of record on review.
5. Designation of printing.

Dated at Washington, D. C., the 2nd day of July, 1948.

/s/ CHARLES OLIPHANT (CAR),
Counsel for Respondent on Review.

[Endorsed]: T.C.U.S. Filed July 2, 1948. [51]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit a typewritten copy of the record on review herein. Petitioner designates the following portions of the record and proceedings in the Tax Court to be contained in the record on review:

1. Docket entries.

2. Pleadings: (a) Petition for Review of Deficiency Determinations. (b) Answer.

3. Opinion promulgated February 5, 1948 (10 T.C. No. 30).

4. Decision, entered May 18, 1948.

5. Petition for review.

6. Notice of filing petition for review.

7. Statement of points.

8. Designation of contents of record on review.

9. If the respondent on review should, pursuant to [52] Rule 75(a) FRCP, designate any additional portions of the record and proceedings, then: (a) Respondent's designation. (b) The additional portions designated by respondent.

10. Stipulation designating venue.

11. Designation of printing.

12. Admission of receipt of service copies of review documents.

13. This designation.

/s/ GEO. M. NAUS,

Attorney for Petitioner on Review.

[Endorsed]: T.C.U.S. Filed June 30, 1948. [53]

The Tax Court of the United States, Washington
[Title of Cause.]

Docket No. 11853

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the fore-

going pages 1 to 53, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 13th day of July, 1948.

(Seal) /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States.

[Endorsed]: No. 11980. United States Circuit Court of Appeals for the Ninth Circuit. Wilson Bros. & Co., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 19, 1948.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11,980

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

WILSON BROS. & Co.,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner on Review,
Respondent on Review.

BRIEF FOR PETITIONER.

GEORGE M. NAUS,

Alexander Building, San Francisco 4, California,

Attorney for Petitioner.

FILED

AUG 26 1948

PAUL P. O'BRIEN,

CLERK

Subject Index

	Page
Jurisdictional statement	2
Statement of the case	3
(a) Notice of deficiencies	3
(b) Petition for redetermination by the Tax Court.....	3
(c) Answer of Commissioner	4
(d) Facts as found by the Tax Court	5
Specification of error	10
Statutory provisions	11
I.	
Internal Revenue Code § 505(b)	11
(a) The statute	11
(b) Legislative history	12
II.	
Internal Revenue Code § 23	20
(a) The statute	20
(b) Legislative history	21
Argument	24
(a) If the boats had been held by an individual instead of by a corporation the expense and depreciation would have been allowable deductions	24
(b) Integration of § 23 with § 505	26
(c) The purpose and intent of the Congress in enacting § 505	28

Table of Authorities Cited

Cases	Pages
Boston Sand & Gravel Co. v. U. S., 278 U. S. 41.....	36
Brown v. Duchesne, 19 How. (60 U.S.) 183	29
Cabell v. v. Markham, 2 Cir., 148 F. (2d) 737 (affirmed, Markham v. Cabell, 326 U.S. 404)	37
Church of the Holy Trinity v. U. S., 143 U.S. 457	30, 31, 32
Commissioner v. Ickelheimer, 2 Cir., 132 F. (2d) 660.....	38
Commissioner v. McWilliams, 6 Cir., 158 F. (2d) 637.....	38
Haggar Co. v. Helvering, 308 U.S. 389	35
Helvering v. Gregory, 2 Cir., 69 F. (2d) 809 (affirmed, Gregory v. Helvering, 293 U.S. 465)	35
Helvering v. Morgan's, Inc., 293 U.S. 121	27
Helvering v. New York Trust Co., 292 U.S. 455.....	37
Knight Newspapers v. Commissioner, 6 Cir., 143 F. (2d) 1007	30
Lau Ow Ben v. U. S., 144 U.S. 47.....	33
McWilliams v. Commissioner, 331 U.S. 694	24, 38
Musselman Hub-Brake Co. v. Commissioner, 6 Cir., 139 F. (2d) 65	26
Ohio ex rel. Popovici v. Agler, 280 U.S. 379	34
Ozawa v. U. S., 260 U.S. 178	27, 28
Pickett v. U. S., 216 U.S. 456	33
Pinella's Ice & Cold Storage Co. v. Commissioner, 287 U.S. 462	35
Sorrells v. U. S., 287 U.S. 435	34, 35
U. S. v. American Trucking Associations, 310 U.S. 534.....	36
U. S. v. Hutcheson, 312 U.S. 219	27, 28
U. S. v. Kirby, 7 Wall. (74 U.S.) 482	30

Statutes	Pages
Criminal Code, Section 41 (18 USC Section 93).....	33
Fair Labor Standards Act, 1938	36
Internal Revenue Code:	
Section 23	10, 11, 20, 25, 26
Section 23(a)	7, 10, 11
Section 23(b)	10
Section 23(1)	7, 11
Section 272	1
Section 272(a) (1)	2
Section 505	11, 26, 28
Section 505(b)	3, 7, 9, 10, 11, 12, 26
Section 1141	2
Section 1141(b)	2
Section 1141(c) (1)	10
Section 1142	1
Judicial Code:	
Section 24, 28 USC Section 41(18)	34
Section 256, 28 USC Section 371	34
Motor Carrier Act, 1935	36
Revenue Act of 1926:	
Section 200(a)	27
Section 206(b)	27
Revenue Act of 1936:	
Sections 351 to 356	12
Section 356(b)	12
Revenue Act of 1938, Section 406(b)	3, 12
Revenue Act of 1942, Section 121	10, 20, 25
United States Constitution, Article 3, Section 2	34

Other Authorities

Act of 1942 (C.B. 1942-2: House, page 372, at 429-430; Senate, page 504, at 570-571)	21
75th Cong., 1st Sess., House Document No. 337	9, 12

	Page
Mencken, A New Dictionary of Quotations, 1060	40
Paul, The Background of the Revenue Act of 1937, 5 Univ. of Chicago Law Rev. 41	12
Plowden Reports 465	39
Regulations 111:	
Section 29.23(a)-15	23
Section 29.23(1)-1	23
Wallace, The Reporters, 143	39

No. 11,980

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILSON BROS. & Co.,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

BRIEF FOR PETITIONER.

May it please the Court:

This is a petition for review¹ of a decision² of the Tax Court under which it made a redetermination³ of deficiencies determined by the Commissioner in respect to personal holding company surtaxes for the five calendar years 1938 to 1942, both inclusive. The Commissioner determined⁴ the surtax deficiencies as follows:

¹IRC § 1142.

²The singular is used for convenience. There are, however, five years involved, i. e., five deficiencies, and therefore five decisions, but all disposed of in a single "decision".

³IRC § 272.

⁴R. 9-28.

<u>Year</u>	<u>Alleged Liability</u>	<u>Assessed</u>	<u>Alleged Deficiency</u>	<u>25% Penalty</u>
1938	\$ 10,066.65	\$.....	\$ 10,066.65	\$ 2,516.66
1939	23,494.70	.....	23,494.70	5,873.68
1940	32,019.46	.....	32,019.46	8,004.87
1941	17,763.09	.....	17,763.09	.....
1942	20,152.40	.....	20,152.40	5,038.10
Totals	\$103,496.40	\$.....	\$103,496.40	\$21,433.31

The Tax Court redetermined the surtax deficiencies as follows:

<u>Year</u>	<u>Personal Holding Deficiency</u>	<u>Company Surtax. 25% Penalty</u>
1938	None	None
1939	\$ 8,517.78	\$2,129.45
1940	13,740.74	3,435.19
1941	9,899.35	None
1942	7,079.22	1,769.80

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court comes from Internal Revenue Code, §§ 1141 and 1142. Pursuant to § 1141(b) (2) there is a venue stipulation at R. 51. The decision of the Tax Court was entered May 18, 1948. (R. 48.) The petition for review was filed with the Clerk of the Tax Court on June 30, 1948. (R. 50.)

The jurisdiction of the Tax Court came from IRC § 272. The notice of deficiency⁵ is dated May 29, 1946. (R. 9.) The petition to the Tax Court for a redetermination was docketed by it on August 20, 1946. (R. 2.)

⁵IRC § 272(a) (1).

STATEMENT OF THE CASE.

(a) Notice of deficiencies.

In the notice of deficiencies the Commissioner determined deficiencies in personal holding company surtaxes⁶ as tabulated supra. The Commissioner's determination reads (R. 13):

“Expenses incurred in 1938 to 1942, inclusive in the respective amounts of \$12,459.96, \$15,094.35, \$15,028.68, \$16,166.87 and \$12,898.05, in connection with the upkeep of certain boats, are not allowed as deductions in computing Title 1A and Subchapter A net income, under Section 406(b) of the Revenue Act of 1938 and Section 505(b) of the Internal Revenue Code.”

(b) Petition for redetermination by the Tax Court.

[Par. 4]:⁷

4. The determination of taxes set forth in the said notice of deficiency is based upon the following errors:

* * *

(b) In determining the tax liabilities of petitioner for personal holding company surtax for each of the years from 1938 to 1942, both inclusive, the Commissioner erroneously disallowed deductions “in connection with the upkeep of certain boats,” in computing Title 1A and Subchapter A net income, under Section 406(b) of the Revenue Act of 1938 and Section 505(b) of the Internal Revenue Code. Said disallowed deductions are in the following amounts:

⁶The notice also includes a determination of ordinary income taxes, but those are not brought up by the petition for review.

⁷R. 5.

<u>Year</u>	<u>Amount</u>
1938	\$12,459.96
1939	15,094.35
1940	15,028.68
1941	16,166.87
1942	12,898.05

[Par. 5]:⁸

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows: * * *

(b) Through the said years 1938 to 1942, both inclusive, petitioner incurred expenses in accordance with the tabular statement of amounts set forth in paragraph 4(b) hereinabove, in connection with the upkeep of certain boats. The boats were not operated during those years, but were necessary to the business of petitioner. No rent or other compensation was received for or from them, and none was obtainable, during any of said years; and there was throughout a reasonable expectation that operation of the boats would result in a profit. They were boats theretofore used in the lumber business and suitable therefor, and have never been used for personal pleasure purposes nor suitable therefor.

(c) Answer of Commissioner.

Par. 5(b):⁹ Admits the boats were not operated; denies the remaining allegations contained in subparagraph (b) of paragraph 5 of the petition.

⁸R. 6-7.

⁹R. 29.

(d) Facts as found by the Tax Court.

[“Findings of Fact”]¹⁰

The corporation was organized in December, 1928 by [W. T. Wilson] and his brother, F. A. Wilson. * * * The brothers were successfully engaged as partners in the milling, shipping and selling of lumber on the west coast of the United States. They operated logging camps and sawmills, manufacturing lumber in Washington and shipping it on the two schooners, the *Oregon* and the *Idaho*, for sale in San Francisco, Los Angeles and San Diego. The business was begun by their grandfather, continued by their father, and they participated in it from early youth. After 1928 it was conducted by the corporation. The schooner *Oregon*, in which the brothers owned a 100 per cent interest, and the schooner *Idaho*, in which they owned a 75 per cent interest, were transferred to the corporation at a value of \$175,000. * * * F. A. Wilson had charge of maintaining and repairing the two schooners which were not in use. * * * He and [W. T. Wilson] were both active in seeking a purchaser or lessor for the schooners, and in 1939 he made an unsuccessful trip to the northwestern states in search of lumber. * * * In 1938 the corporation ceased to deal in lumber, and its only business was the care of investments and the collection of dividends and a small amount of rent. * * * The two schooners, transferred to the corporation, are wooden-hulled boats of 1,800 tons, dead weight, with cargo space for 1,200,000 board feet of lumber. After being operated by the corporation for a

¹⁰R. 33, 10 T. C. 251 (10 T. C. No. 30) promulgated February 5, 1948.

part of the year 1929, they were "laid up" because a lull in the lumber market left [W. T. Wilson] with large unsold stocks on hand. For some years thereafter [W. T. Wilson] and his brother expected to put the boats back into service, shipping lumber in them again when market conditions should improve. But in succeeding years such conditions grew worse, and the boats have never been used. They have been kept moored, however, under the care of a watchman who cleans and paints the superstructure, and at intervals of 15 to 18 months they are placed in drydock for general overhauling, caulking and repairs. While not seaworthy since 1929, they have been maintained in such a condition that they could be made so within a period of 60 to 90 days. In 1938 [W. T. Wilson] took over individually a retail branch of the corporation's business, selling pine to motion picture studios and others from the office and lumber yard which the corporation formerly used. Since that year the corporation has not dealt in lumber or derived any income from its sale. During the years 1938-1942 numerous efforts were made to sell or lease the boats, some offers were received but not accepted. Being of wood the schooners are inferior to ships having steel hulls and can not be as readily leased or sold. During the war they were not desired by the Maritime Commission because slow and small. For the years 1938-1942 the following amounts were claimed and **allowed for income tax purposes** as depreciation and expenses connected with them:

<u>Year</u>	<u>Total</u>	<u>Depreciation</u>	<u>Expenses</u>
1938	\$12,459.96	\$10,002.08	\$2,457.88
1939	15,094.35	10,002.08	5,092.27
1940	15,028.68	10,002.08	5,026.60
1941	16,166.87	10,002.08	6,164.79
1942	12,898.05	10,002.08	2,895.97

These amounts were not allowed as deductions in the determination of the corporation's personal holding company surtax. The corporation received no rent or other compensation for the use of the boats in 1938, 1939, 1940, 1941 and 1942; the boats were not held in the course of the corporation's business in those years and were not necessary to the conduct of that business.

[“Opinion”]^{10a}

In determining the corporation's personal holding company surtax for the years 1938-1942, the Commissioner disallowed as deductions the amounts representing depreciation and expenses connected with the two schooners although such amounts were deducted in his determination of the corporation's income tax. The corporation assails the disallowance and respondent defends his action on the ground that the schooners were not property of the kind required by section 505(b), Internal Revenue Code, to support the deduction. This section, defining Subchapter A Net Income for computation of surtax on a personal holding company, limits the deductions available under section 23(a), relating to expenses, and section 23(1), relating to depreciation, to an amount equal to rent or other compensation from the property

^{10a}R. 38. 10 T. C. 255.

affected unless it is established to the Commissioner's satisfaction:

(1) That the rent or other compensation received was the highest obtainable, or, if none was received, that none was obtainable;

(2) That the property was held in the course of a business carried on *bona fide* for profit; and

(3) Either that there was reasonable expectation that the operation of the property would result in a profit, or that the property was necessary to the conduct of the business.

Since the corporation derived no income whatever from the boats, it is entitled to the deductions claimed only if it proves that the three conditions are fulfilled in respect of them.

In our opinion fulfillment of none of the conditions has been affirmatively shown. The boats were "laid up" in 1929, and while plausible that they could not have been leased during the depression, we cannot believe leasing or income-producing operation impossible in 1938 and succeeding years, especially after the outbreak of the war. [W. T. Wilson] and his brother admitted that offers to buy or lease them were received. They failed to give any details or explain the business justification for refusing all of them, and since the boats could have been made seaworthy, we can not on this record make the essential finding that some income could not have been obtained from them. As the corporation ceased to deal in lumber in 1938 and the boats had not been used since 1929, it is manifest that they were not held in the course of the corporation's business, and that they were

not necessary to the conduct of its business. [W. T. Wilson's] professed wish to lease or sell them, indeed, is so indicative. Conceivably there could have been a "reasonable expectation that the operation of the property would result in a profit," but petitioner's testimony, directed to establishing that the boats could not be used, leased or sold advantageously, even though not convincing, obviously does not support an affirmative finding that they could have been.

In his brief petitioner's counsel urges that section 505(b) be interpreted according to its spirit rather than its letter; he quotes excerpts from a report of the Congressional Joint Committee on Tax Evasion and Avoidance (75th Cong., 1st Sess., House Document No. 337) and from other official statements to show that its provisions were intended to deny deductions to a corporation formed by a wealthy taxpayer with no other purpose than to hold his securities and pleasure yachts and enjoy deductions to which the taxpayer individually would not be entitled. Petitioner's corporation, it is argued, was organized for a genuine business purpose and does [*sic*] [not] fall within the class envisaged by the statute. We agree that in its genesis and original operation it bore no resemblance to the personal holding company which the legislation was designed to cover. But during that period it actively engaged in the lumber business, and, we may presume, derived more than 20 per cent of its income from that business so that it did not then qualify as a personal holding company and was not subject to the taxing provisions here considered. But its status changed in 1938; it discontinued

the lumber business; its assets consisted almost entirely of securities, having a market value in excess of \$800,000, and two lumber boats; it became in effect for its two stockholder brothers "the incorporated pocket book," which Congress had in mind in enacting section 505(b). It is not material that the boats were not yachts. The **significant fact** is that if the brothers had owned them directly, they would **not** have been entitled to deductions for depreciation and maintenance expense because the boats were not used in a business or transaction for profit.¹¹ And in our opinion it was the intention of Congress in enacting 505(b) that the corporation holding them be in no more favorable a position for claiming such deductions. Accordingly we sustain the Commissioner's disallowance.

SPECIFICATION OF ERROR.

The decision of the Tax Court is not in accordance with law¹² because it erred prejudicially in concluding and deciding, upon the facts found, that the boat expenses and depreciation were not deductible in comput-

¹¹Clearly, at this point, the opinion goes astray. There is complete oversight of, or failure to give effect to, the retroactive amendment, by section 121 of the Revenue Act of 1942, of all earlier Acts, "as if they were a part of" each "Revenue Act on the date of its enactment". Before that sweeping retroaction the deduction section, § 23(a), limited deductions to expenses paid or incurred "in carrying on any *trade or business*", and 23(b) limited depreciation to "property *used* in the trade or business". By the retroaction under Act of 1942, § 121, there was added as allowable deductions under *all* earlier Acts expenses and depreciation as to "property held for the production of income". See § 23 under "Statutory Provisions", *infra*.

¹²IRC § 1141(c)(1).

ing the alleged deficiencies in personal holding company surtaxes. (For the underlying Statement of Points see R. 50.)

STATUTORY PROVISIONS.

As will appear in the Argument *infra* this review presents an integration of section 505(b) with the expense and depreciation provisions of section 23 of the Internal Revenue Code, and corresponding portions of earlier Acts.

I.

INTERNAL REVENUE CODE § 505(b).

(a) The statute.

§ 505. Subchapter A Net Income.

For the purposes of this subchapter the term "Subchapter A Net Income" means the net income with the following adjustments:

(a) Additional deductions. * * *

(b) Deductions not allowed. The aggregate of the deductions allowed under Section 23(a), relating to expenses, and Section 23(1), relating to depreciation, which are allocable to the operation and maintenance of property owned or operated by the corporation, shall be allowed only in an amount equal to the rent or other compensation received for the use of, or the right to use, the property, unless it is established (under regulations prescribed by the Commissioner with the approval of the Secretary) to the satisfaction of the Commissioner:

(1) That the rent or other compensation received was the highest obtainable, or, if none was received, that none was obtainable;

(2) That the property was held in the course of a business carried on bona fide for profit; and

(3) Either that there was reasonable expectation that the operation of the property would result in a profit, or that the property was necessary to the conduct of the business.

(b) Legislative history.

Section 505(b) of the Code originated in the first section of Revenue Act of 1937, which recast § 351, "Surtax on Personal Holding Companies", of the 1936 Act into amended or new Sections 351 to 356. Section 356(b) is the relevant section, and in turn through the 1938 Act, § 406(b), was carried into the Code as § 505(b). The starting point is therefore the Act of 1937. (Generally, see Paul, *The Background of the Revenue Act of 1937*, 5 Univ. of Chicago Law Rev. 41.)

The report of the joint committee on Tax Evasion and Avoidance (75th Cong., 1st sess., House Doc. No. 337), opens on the first page with a reprint of the President's Message of June 1, 1937, to the Congress. The message embodied the whole of a letter of May 29, 1937, to the President from the Secretary of the Treasury. *Inter alia* the Secretary said:

"I herewith enumerate some of the principal devices now being employed by taxpayers with large incomes for the purpose of defeating the income taxes which would normally be payable by them."

From page 3 of the report of the joint committee we quote the fourth in the Secretary's enumeration:

“4. THE DEVICE OF INCORPORATING YACHTS AND
COUNTRY ESTATES

Many wealthy taxpayers today are dodging the express provisions of the law denying **deductions for personal expenses** by incorporating their yachts or their country estates, turning over to the yacht or to the estate securities yielding an income just sufficient to pay the entire expense of operation. Hundreds of thousands of dollars in income taxes are annually avoided in this way.

Thus, one man's yacht is owned by his personal holding company, along with \$3,000,000 in securities. He rents the yacht from his company for a sum far less than the cost of upkeep, and the company uses its income from the securities to pay the wages of the captain and crew, the expenses of operating the yacht, and an annual depreciation allowance. None of these items would be deductible **if this individual owned the yacht personally.**

A great many wealthy taxpayers are utilizing a similar arrangement for the operation of their country places and town houses.

One man has placed his \$5,000,000 city residence in such a corporation; another his racing stable whose losses last year were nearly \$200,000. The tax savings he thus sought to obtain through the use of the holding company were \$140,000.

One wealthy woman has improved on the general plan of evasion by causing her personal holding company, which owns her country place, to employ her husband at a salary to manage it. She can thereby

supply him with pocket money, and in effect claims a tax deduction for the expense of maintaining him.”

By joint resolution of June 11, 1937, a joint committee on tax evasion and avoidance was created and the joint committee began public hearings on June 17, 1937. (report page 6.) *Inter alia* the committee reported (page 12):

“Increased use is being made of the device of incorporating yachts, city residences, country estates, etc., in order to avoid taxation of income at the rates prescribed in the higher individual surtax brackets or to obtain the benefit of deducting as corporation expenditures **items not allowed to individuals**, or both. The cases presented to the committee indicate that the plan in general consists of the transfer of the yacht or the real estate to a corporation for stock, or as paid-in surplus, or the yacht or real estate is purchased with cash provided by the stockholders. Securities, producing sufficient income to absorb corporate expenditures, are then turned over to the corporation for stock or as paid-in surplus. To lend color to the alleged business activity and to bring the corporation’s gross income outside of the provisions of section 351 of the existing law, the corporation charges its principal stockholder some rent for the use of the yacht or real estate. The rent paid is usually much below the cost of the operation of the property and much below the amount which would be charged in an arm’s length transaction. Since all expenses and losses of the corporation are claimed as deductions in computing the income of the corporation, a large part of the investment income is absorbed by expenses and losses incurred in the operation of the yacht or the real property. Since rents are not now included for the purpose of deter-

mining whether or not a corporation is a personal holding company, the taxpayer may also fix the amount of the rent for the yacht or real estate in an amount sufficient to bring his other investment income below the 80-percent test required under section 351 of existing law.

The committee finds no justification for permitting such tax advantage to these self-incorporated individuals. It is, therefore, suggested that the definition of personal holding company be so framed as to include in the 80-percent test the full amount received as rent or other compensation for the use of property by a corporation from any individual (whether a shareholder or not), who, together with his family and partners owns (directly or indirectly) 25 percent or more in the value of the securities which constitute 'outstanding stock.'

The committee also recommends that there should be disallowed as a deduction from gross income, the expenses of operation and maintenance (including depreciation) of property owned or operated by a personal holding company to the extent that expenses exceed the rent or other compensation for the use of such property, unless it is established to the satisfaction of the Commissioner—

(A) That the rent or other property received is the highest obtainable;

(B) That the property was held in the course of business carried on bona fide for profit; and

(C) That there was reasonable expectation that the operation of the property would result in a profit, or that such property was necessary to the conduct of the business.

To prevent a personal holding company from charging expenses in excess of its income for the operation and maintenance of property, such as yachts, city residences and country estates, etc., against its investment income, such expenses should be disallowed unless the corporation can meet the conditions outlined above. This has the effect of **placing the personal holding company on the same basis, in this respect, as an individual who cannot offset his personal expenses against his income.** If the corporation establishes to the satisfaction of the commissioner that the second test is satisfied and that the property was necessary to the conduct of such business, it will not be necessary to prove there was reasonable expectation that the operation of the property would result in a profit, in order to obtain a full deduction.

This provision would not apply to a farm or a racing stable operated by the corporation itself where more than 20 percent of the gross income of such corporation came from such operations. This is because the corporation must first be a personal holding company before this provision will apply. Moreover, even if such a corporation is a personal holding company because more than 80 percent of its income comes from investment sources, it will still have the opportunity of escaping this provision by establishing that the property was held in the course of a bona fide business carried on for profit and that such property was necessary for the conduct of the business. Even where an investment corporation is running a yacht, city residence, or country estate on the side, it is, nevertheless, recognized that certain property may be necessary for the conduct of its investment business, such as typewriters, office furniture, automobiles, and the like. Expenses attributable to such property would satisfy the third test."

That portion of the report is grounded in large part on the statements at the hearings (Hearings, pages 225 and 226) of a designated spokesman of the Treasury (Mr. Arthur H. Kent, assistant general counsel, Treasury Department), i. e.:

“The plan of reduction of tax by the corporate device is very simple for an individual of large means. All that is necessary is that he form a corporation, the articles of incorporation of which are made sufficiently broad to permit it, in addition to investing in securities, to own and operate real estate, and to own and operate, lease or rent yachts or other property which he uses for personal enjoyment. The yacht or the real property or both are thus conveyed to the corporation in exchange for its stock or as paid-in surplus, or are purchased by the corporation with cash previously advanced by the stockholder. Income-producing securities are then turned over to the corporation (usually a domestic one) for stock or as paid-in surplus so as to provide it with a substantial income with which to defray alleged operating expenses. In most instances possibly in order to lend some color to its alleged business activities, the corporation will charge its sole or principal stockholder charter fees for the use of the yacht or rent for occupying the residence or other estate. Such charges for fees or rents are typically far below the actual costs of the operation and maintenance or depreciation of the property, and usually much below the amount which would have to be charged in an arm's length transaction to yield a fair return upon the value of the property regarded as an investment.

The corporation claims to be carrying on a business as permitted by its articles of incorporation and de-

fends its claim to a deduction of the expenses on the ground that section 23(a) of the Revenue Act of 1936 and the corresponding provision of prior acts permits a deduction for all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

It has been very generally assumed that the business of a corporation comprehends all its actual activities which it is empowered by its charter to carry on and which are therein declared to be the objects of its incorporation. In the cases of a great majority of corporations formed bona fide to carry on commercial enterprises for profit, this assumption no doubt accords with the realities. It is difficult to believe, however, that the Congress ever contemplated or expected that the device of incorporation would be abused by individuals in order to obtain tax-saving deductions for **expenditures which would be disallowable, if claimed by them as individuals, under the clear language of section 24 (a) (1), which provides that 'no deduction shall in any case be allowed in respect of (1) personal, living, or family expenses.'**

The investigation so far made, which is far from complete, indicates that this device of creating corporations for the purposes of holding, maintaining, and operating yachts, city mansions, country estates, and racing stables in such manner as possibly to nullify the effect of the express provisions of the statute, which deny or limit the deduction of personal expenses, is now being employed by many wealthy taxpayers and that there is a tendency toward increased use of it. The potential menace to the integrity of the revenues which it contains is very great for it is capable of profitable use by any taxpayer

who owns property requiring large personal expenditures and who also owns a substantial amount of income-producing property.”

At this point in his testimony Mr. Kent presented the following detailed statement with respect to Mr. Alfred P. Sloan's yacht *Rene* (incorporated as Rene Corporation) and Mrs. Emily R. Cadwalader's yacht *Savarona* (incorporated as Savarona Ship Corporation). *Yacht Rene* (page 227) :

<u>Year</u>	<u>Revenue from charter hire</u>	<u>Yacht expenses exclusive of taxes and interest</u>	<u>Loss on Operation</u>
1931	\$108,000.00	\$161,514.20	\$53,514.20
1932	108,000.00	104,349.21	3,650.79
1933	None	34,423.45	34,423.45
1934	90,113.73	151,216.69	61,102.96
1935	116,986.89	134,009.93	67,023.04
1936	119,608.78	185,670.32	36,061.54
Total	\$542,709.40	\$821,183.80	\$278,474.40

Yacht Savarona (page 232) :

<u>Year</u>	<u>Revenue from charter hire</u>	<u>Expense of operating yacht</u>	<u>Loss on Operation</u>
1931	\$ 75,000.00	\$ 145,346.36	\$ 70,346.36
1932	137,922.35	152,408.15	14,485.80
1933	28,613.47	208,585.03	179,971.56
1934	.....	168,891.33	168,891.33
1935	.....	170,784.51	170,784.51
1936	.....	191,007.03	191,007.03
Total	\$241,535.82	\$1,037,022.41	\$795,486.59

II.

INTERNAL REVENUE CODE § 23.

(a) The statute.

All of the revenue acts, from the beginning in 1913, i.e., including the Acts of 1936, 1937, 1938 and the Code, were retroactively amended by Section 121 of the Act of 1942 as follows:

“Sec. 121. NON-TRADE OR NON-BUSINESS DEDUCTIONS.

(a) DEDUCTIONS FOR EXPENSES.—Section 23(a) (relating to deduction for expenses) is amended to read as follows:

‘(a) EXPENSES.—

‘(1) TRADE OR BUSINESS EXPENSES.— * * *

‘(2) NON-TRADE OR NON-BUSINESS EXPENSES.— In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation or maintenance of property held for the production of income.’ * * *

(b) * * *

(c) DEPRECIATION DEDUCTION.—The first sentence of section 23(1) (relating to deduction for depreciation) is amended to read as follows: ‘A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

‘(1) of property used in the trade or business,
or

‘(2) of property held for the production of income.’

(d) TAXABLE YEARS TO WHICH AMENDMENTS APPLICABLE.—The amendments made by this section

shall be applicable to taxable years beginning after December 31, 1938.

(e) **RETROACTIVE AMENDMENTS TO PRIOR REVENUE ACTS.**—For the purposes of the Revenue Act of 1938 or any prior revenue Act the amendments made to the Internal Revenue Code by this section shall be effective as if they were a part of such Revenue Act on the date of its enactment.”

(b) **Legislative history.**

The committee reports, Act of 1942 (C. B. 1942-2: House, page 372, at 429-430; Senate, page 504, at 570-571) say:

“Section 118. **NON-TRADE OR NON-BUSINESS DEDUCTIONS.**

This amendment allows a deduction for the ordinary and necessary expenses of an individual paid or incurred during the taxable year for the production and collection of income, or for the management, conservation, or maintenance of property held by the taxpayer for the production of income, whether or not such expenses are paid or incurred in carrying on a trade or business, and also allows a deduction for the exhaustion and wear and tear (including a reasonable amount of obsolescence) on property held for the production of income, whether or not such property is used by the taxpayer in a trade or business.

For an expense to be deductible under this section, it must have been incurred either (1) for the production or collection of income, or (2) for the management, conservation, or maintenance of property held for the production of income. Ordinary and necessary expenses so paid or incurred are deductible

under section 23(a) (2) even though they are not paid or incurred for the production or collection of income of the taxable year or for the management, conservation or maintenance of property held for the production of such income. **The term 'income' for this purpose comprehends not merely income for the taxable years but also income which the taxpayer has realized in a prior taxable year or may realize in subsequent taxable years, and is not confined to recurring income** but applies as well to gain from the disposition of property. Expenses incurred in managing or conserving property held for investment may be deductible under this provision **even though there is no likelihood that the property will be sold at a profit or will otherwise be productive of income.** The expenses, however, of carrying on a transaction which does not constitute a trade or business of the taxpayer and is not carried on for the production of income or for the management, conservation, or maintenance of property, but which is carried on primarily as **a sport, hobby, or recreation** are not allowable as nontrade or nonbusiness expenses.

Expenses, to be deductible under section 23(a) (2), must be ordinary and necessary, which rule presupposes that they must be reasonable in amount¹³ and must bear a reasonable and proximate relation to the production or collection of income, or to the management, conservation, or maintenance of property held for that purpose. * * *

Subsection (d) of this section amends section 23 (1) of the Internal Revenue Code so as to allow, in addition to the deduction allowable under the existing law, a deduction for the **exhaustion, wear and tear of**

¹³At bar they were allowed by the Commissioner for purposes of ordinary income tax.

property held by the taxpayer for the production of income, whether or not the property in question is used in the trade or business of the taxpayer, including a reasonable allowance for obsolescence. Except for this, the new allowance is subject to the same limitations and restrictions which have been applicable under this section prior to the present amendment.

The amendments made to the Internal Revenue Code by this section are applicable to all taxable years beginning after December 31, 1938. These amendments shall also be effective as if they were a part of the Revenue Act of 1938 or any prior Revenue Act on the date of its enactment.”

Patterned on those reports, Reg. 111, § 29.23(a)-15¹⁴ says:

“* * * The term ‘income’ [‘held for the production of income’] for the purpose of section 23(a) (2) comprehends not merely income for the taxable year but also income which the taxpayer has realized in a prior taxable year or may realize in subsequent taxable years; and is not confined to recurring income but applies as well to gains from the disposition of property. * * * Expenses incurred in managing, conserving, or maintaining property held for investment may be deductible under this provision **even though the property is not currently productive and there is no likelihood that the property will be sold at a profit or will otherwise be productive of income and even though the property is held merely to minimize a loss with respect thereto.** The expenses, however, of carrying on transactions, which do not constitute a trade or business of the taxpayer and

¹⁴Extended by the first sentence of § 29.23(1)-1 to depreciation deductions.

are not carried on for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income, but which are carried on primarily as a **sport, hobby, or recreation** are not allowable as nontrade and non-business expenses. * * *

ARGUMENT.

The question on this review is addressed to the legal conclusion drawn by the Tax Court from the facts found by it. A "decision" or "judgment" is simply the legal conclusion drawn by a Court from the facts found. No question of sufficiency or weight of evidence is here present. Findings rest upon the evidence, but the judgment, "decision," rests upon the findings. This review relates to the meaning and application of the words of a statute to the facts found, and is therefore outside the Dobson rule: *McWilliams v. C.I.R.*, 331 U.S. 694, 703, last paragraph. We therefore turn to the questions of meaning and application:

- (a) If the boats had been held by an individual instead of by a corporation the expense and depreciation would have been allowable deductions.

Prior to 1942 the statutory words of the earlier Acts, from the beginning in 1913, were: (1) as to Expenses, "in carrying on any trade or business"; and (2) as to Depreciation, "wear and tear of property used in the trade or business." The **pre-1942** words therefore fit the following passage in the Tax Court's decision at bar (10 T. C. at 259):

“The significant fact is that, if the brothers had owned [the boats] directly, they would not have been entitled to deductions for depreciation and maintenance expense, because the boats were not used in a business or transaction for profit.”

Although the five tax years at bar are 1938-1942, nevertheless § 121 of the Act of 1942 amended deduction Section 23 of the Code and the 1938 Act *retroactively*. By the retroaction Section 23 became, as to both expenses and depreciation, as if *from the beginning* it had read: “(1) of property used in the trade or business, or (2) of **property held for the production of income.**” The 1942 Act thereby introduced the new concept of “non-trade or non-business” deductions, and coined the new inclusionary phrase “property held for the production of income” in antithesis of “sport, hobby or recreation,” which when tacked to the previously established express exclusion of an individual’s “personal, living or family expenses” rounds out the antithesis to “property held for the production of income.” This is abundantly made clear in the Committee Reports under the 1942 Act, set out *supra* under “Statutory Provisions.” The correct legal conclusion from the facts as found by the Tax Court with respect to the boats is that they were “property held for the production of income.” This is true, as stated in the Committee reports, “even though there is no likelihood that the property will be sold at a profit or will otherwise be productive of income.” In consequence, the lumber boat expense and depreciation are proper items of deduction by an individual.

(b) Integration of § 23 with § 505.

In 1937 the current *revenue* act was the Act of 1936. The Act of 1937 was not a revenue act but was an act aimed against evasion and avoidance of the revenue Act of 1936. The Act of 1937 was a *dependent*, not an independent, statute. It is purely a dependent statute "designed to prevent tax avoidance." It is not to be read alone, but must be *integrated* with its basic revenue Act of 1936, to determine what loophole was to be plugged, i.e., the general deduction sections of the basic act.

The true basis of interpreting the 1937 Act was stated under that Act in *Musselman Hub-Brake Co. v. Commissioner*, 6 Cir., 139 F. (2d) 65, 67, col. 2, as follows:

"Taxing statutes must be applied within reasonable limits and construed in the light of their purpose. One designed to prevent tax avoidance may, under some circumstances, be liberally interpreted in favor of the taxpayer by **confining its scope to the object of its creation.**

It is necessary to read Sections 23(a) (1) and 24(c) (1) **together** in order to arrive at the intention of the Congress under the long established rule that the purpose of the enactment is to be deduced from a view of every material part of the statute on the subject. *Helvering v. Rebsamen Motors, Inc.*, 8 Cir., 128 F. (2d) 584.

We are not here concerned with the rule that deductions are a matter of legislative grace and therefore the taxpayer must bring a claimed deduction clearly within the terms of the statute, because the statutes we are considering all relate to deductions. When Section 23 is applied, the deductions in question are clearly allowable, but for Section 24(c). So,

the rule applies that the two sections should be **integrated** to carry into effect their combined purpose. *Anderson v. Pacific Coast S. & S. Co.*, 225 U. S. 187, 203."

Similarly, when the deduction sections of the 1936 Act and the loophole plugging sections of the 1937 Act were carried forward into the 1938 Act and in turn into the Code. *Helvering v. Morgan's, Inc.*, *infra*; *Ozawa v. U. S.*, *infra*; *U. S. v. Hutcheson*, *infra*. We state those cases:

The corporation Morgan's, Inc., on June 1, 1925, affiliated with the corporation Haines Furniture Company, and in its return of income taxes for the full year 1925 made separate income tax returns, one for the fraction of five months before affiliation and the other for the remaining fraction of seven months. In the respective periods of five and seven months in 1925, and during 1926, it suffered net losses but made a net profit in 1927. The literal reading of Act of 1926, § 200(a), was "The term 'taxable' year includes, in the case of a return made for a fractional part of a year," and § 206(b) permitted a carry-forward of a net loss "for any taxable year" and deduction of it through two succeeding taxable years. The Commissioner sought, upon a literal application of the words of § 200(a), to exclude a carry-forward of the fraction of five months through two succeeding "taxable years." In ruling against that contention the Court said, *Helvering v. Morgan's, Inc.*, 293 U.S. 121, at 126:

"But the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, **however precise its language**, cannot be ascer-

tained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part.”

Takao Ozawa was entitled to have his application for naturalization granted if the words of the naturalization Act of 1906 were literally applied without dependent consideration of the naturalization title of the Revised Statutes, but in *Ozawa v. U. S.*, 260 U.S. 178, he was denied naturalization because the Court ruled that it was *unreasonable* to make such literal application “at variance with the policy of the legislation as a whole,” and that to find and give effect to the underlying legislative purpose the Court could “look to the reason of the enactment, and inquire into its antecedent history.” (260 U.S. at 194.)

The indictment in *U. S. v. Hutcheson*, 312 U.S. 219, was good under a literal reading and application of the Sherman Act, but was held bad because outside the Congressional purpose under the Norris-LaGuardia Act. The Court said that the words of a statute should “not be read in a spirit of mutilating narrowness.” (312 U.S. at 235.)

(c) The purpose and intent of the Congress in enacting § 505.

It is perfectly clear that the purpose of the Congress was and is simply to deny to a “personal holding company” as a corporation any deduction not permitted if a yacht or boat were held by an individual. That is the whole of the **field of application** of the statute, the test of application.

It is difficult to imagine a case in which materials for ascertaining the purpose and intent in enactment of a statute could be clearer than in the enactment of the Act of 1937. It is fully and clearly spelled out in the "Legislative History" set out *supra* under § 505(b).

The literal words of a statute must be literally applied, but the purpose and intent of the legislature must, if clearly known, furnish the guide to the **field of application** of the statutory words.

In *Brown v. Duchesne*, 19 How. (60 U.S.) 183, the suit was for damages for alleged infringement of a patent issued pursuant to the act of Congress for a new and useful improvement in constructing the gaff of sailing vessels, and was brought by the patentee against the alien owner of a foreign flag vessel which was temporarily within the port of Boston. It was clear that the infringement suit was literally within the words of the Act, but it failed because wholly outside the *field of application* intended by the Congress. The Court said that although the case fell within the letter of the statute, "the Court is of opinion that cases of that kind were not in the contemplation of Congress in enacting the patent laws, and cannot, upon any sound construction, be regarded as embraced in them. * * * We think these laws ought to be construed in the spirit in which they were made—that is, as founded in justice—and should not be strained by technical constructions to reach cases which Congress evidently could not have contemplated, without departing from the principle upon which they were legislating, and going far beyond the object they intended to accomplish". (15 L. Ed. at 600, col. 1.)

The words of the statute on which the indictment in *U. S. v. Kirby*, 7 Wall. (74 U.S.) 482, was laid were, “if *any* person shall knowingly and willfully obstruct or retard the passage of the mail”, and therefore literally reached the act of the sheriff Kirby in executing a state warrant of arrest on the mail carrier Farris. But, clearly, the sheriff’s act was outside the intended field of application of the act of Congress, and therefore his defensive plea was held good. The Court said (19 L. Ed. at 280, col. 2):

“All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter.”

The leading case of *Church of the Holy Trinity v. U. S.*, 143 U.S. 457, was a suit by the United States to recover a statutory penalty¹⁵ of \$1,000.00 under an act which imposed it upon anyone who “in any manner whatsoever” assisted the importation or migration of any alien or foreigner into the United States. The defendant brought an alien into the United States from England to serve it

¹⁵The personal holding company surtax is a penalty surtax, *Knight Newspapers v. Commissioner*, 6 Cir., 143 F. (2d) 1007. There, the Court said *inter alia* (at page 1010, col. 1): “It is within the power of the court to declare a thing which is within the letter of the statute, not governed by the statute, because not within its spirit or the intention of its makers. *Pembroke Realty & Securities Co. v. Commissioner*, supra [122 F. 2d 262]; *Holy Trinity Church v. United States*, 143 U.S. 457; *Gregory v. Helvering*, 293 U.S. 465.”

as rector and pastor. The Court said that "it must be conceded that the act of the corporation is within the letter" of the statute (page 458), but further said (page 460):

"The court must restrain the words. The object designed to be reached by the Act must limit and control the literal import of the terms and phrases employed."

At page 463 the Court said:

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. *United States v. Union Pac. R. Co.*, 91 U. S. 72, 79. The situation which called for this statute was briefly but fully stated by *Mr. Justice Brown* when, as district judge, he decided the case of *United States v. Craig*, 28 Fed. Rep. 795, 798: 'The motives and history of the Act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the Act in question, the design of which was to raise

the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage.' ”

It was thereupon held that the particular case before the Court, although literally within the statute, was not within the object or evil sought to be remedied, and therefore the defendant was not subject to the statutory penalty. In conclusion (page 472), the Court ruled that the facts were not within the *field of application* of the statute, and therefore not “within the statute”, saying:

“It is a case where there was presented a definite evil, in view of which the Legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that **however broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute.**”

After the alien Lau Ow Ben had been domiciled in Portland, Oregon, as a merchant for seventeen years, he went to China for a temporary visit with the intention of promptly returning to the United States. Upon reaching the port of San Francisco on his return he did not produce the statutory certificate required under the exclusion acts of 1882 and 1884, the words of which if literally applied would exclude him from entry. It was ruled that

his case, *Lau Ow Ben v. U. S.*, 144 U. S. 47, was not within the field of application, the Court saying (36 L. Ed. at 345, col. 2):

“The general terms used should be limited to those persons to whom Congress manifestly intended to apply them, and they would evidently be those who are about to come to the United States for the first time, and, therefore, might properly be required to apply to their own government for permission to do so, as also to so identify them as to distinguish them as belonging to the classes who could properly avail themselves of such leave.”

He was accordingly permitted to enter without the statutory certificate.

Pickett v. U. S., 216 U. S. 456, was a capital case. Appellate review of Silas Pickett's conviction of murder, in a federal District Court created upon the admission of Oklahoma as a state, turned on the statutory words “when admitted”. A literal application of the words would have saved Silas Pickett's life, but he lost it because the Supreme Court ruled (216 U. S. at 461): “The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage”.

The words of section 41 of the Criminal Code (18 USC § 93), “No officer or agent of any corporation * * * shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation”, literally embraced Alien Property Custodian Garvan as president of the corporation Chemical Foundation. However, the Court declined to apply the words to

him. It said that the statute was a penal one and was not to be "extended" to cases "exceptional to its spirit and purpose" (272 U.S. at 18), and that, "The transactions complained of did not involve any of the evils aimed at by § 41" (272 U.S. at 19).

The plain literal words of the Constitution, art. 3, § 2 are: "The judicial power shall extend * * * to all cases affecting * * * consuls"; and of the Judicial Code, § 256, 28 USC § 371: "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states, * * * Eighth. Of all suits and proceedings * * * against consuls or vice consuls". Judicial Code, § 24, 28 USC § 41(18), conferred original jurisdiction on the District Courts, "Of all suits against consuls and vice consuls." "All" is the acme of inclusion. The words "all cases" plainly and clearly embrace a suit against a vice consul for divorce and alimony, yet the Supreme Court refused to apply the words to such a case in *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379. It said (280 U.S. at 383):

"The language, so far as it affects the present case, is pretty sweeping, but, like all language, it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used."

The acquittal of Sorrells in the entrapment case of *Sorrells v. U. S.*, 287 U.S. 435, notwithstanding his guilt if the words of the penal statute were literally applied, was grounded upon the ruling against the prosecutor's contention that rested "entirely upon the letter of the

statute” and took “no account of the fact that its *application* in the circumstances under consideration is foreign to its purpose” (287 U.S. at 446), and the Court condemned a “literal interpretation of statutes at the expense of the reason of the law” (page 446), citing fourteen of its earlier decisions. (287 U.S. at 446-448.)

In *Pinella's Ice & Cold Storage Co. v. Commissioner*, 287 U.S. 462, the taxed transaction was literally within the non-recognition words (“substantially all the properties of another corporation”), but the gain was recognized and taxed because the transaction was “beyond the evident purpose of the provision”. (287 U.S. at 470.)

In *Helvering v. Gregory*, 2 Cir., 69 F. (2d) 809 (affirmed, *Gregory v. Helvering*, 293 U.S. 465), the taxed transaction was literally within the non-recognition words of the statute but the gain was recognized and taxed because the transaction was outside “the underlying presupposition” (69 F. (2d) at 811, col. 1) gleaned from legislative committee reports. Judge Hand’s “underlying presupposition” became in the Supreme Court “the thing which the statute intended”. (293 U.S. at 469.)

The question in *Haggar Co. v. Helvering*, 308 U.S. 389, related to “declared value” in a capital stock tax return, with respect to the value “as declared by the corporation in its first return”, and was whether, when the first return was amended, the amended return remained the first or became the second return. Holding that it remained the first, the Court said (308 U.S. at 394):

“All statutes must be construed in the light of their purpose. A literal reading of them which would

lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.”

The respective fields of application are mutually exclusive under the sections of the Motor Carrier Act, 1935, and the Fair Labor Standards Act, 1938, considered in *U. S. v. American Trucking Associations*, 310 U.S. 534, wherein the words “maximum hours of service of employees” used in the Motor Carrier Act were plain and literally applicable to all employees. However, the dominant purpose was safe operation, and it was ruled that the purpose controlled the letter; and therefore the words were to be applied only to employees whose activities affect the safety of operation. The Court pointed out that when the plain meaning of words has led to absurd or futile results it has on occasion “looked beyond the words to the purpose of the act”, and added (310 U.S. at 543):

“Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is **available**, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination’.”

In marginal note 22 thereto *Boston Sand & Gravel Co. v. U. S.*, 278 U.S. 41, 48, was cited, where it had been said:

“It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an opinion of experience

than a rule of law and does not preclude consideration of persuasive evidence if it exists.”

Accord, *Helvering v. New York Trust Co.*, 292 U.S. 455, 463-465, where the Court rejected the Government’s argument that “If the language be clear it is conclusive” (292 U.S. at 464), and quoted: “a thing which is within the letter of the statute, is not within the statute, unless it is within the intention of the makers”. (292 U.S. at 465.)

In *Cabell v. Markham*, 2 Cir., 148 F. (2d) 737 (affirmed, *Markham v. Cabell*, 326 U.S. 404), literal application of the words of a statute was refused because outside the purpose; it was stated¹⁶ (148 F. (2d) at 739) that

¹⁶148 F. (2d) at 739: “Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute. We need cite no others than the more recent of those in the Supreme Court which have followed *Rector*, etc., of *Holy Trinity Church v. United States*, 143 U.S. 457; *Pickett v. United States*, 216 U.S. 456, 461; *American Security & Trust Co. v. District of Columbia*, 224 U.S. 491, 495; *Takao Ozawa v. United States*, 260 U.S. 178, 194; *United States v. Katz*, 271 U.S. 354, 362; *Sorrells v. United States*, 287 U.S. 435. See also *United States v. Ryan*, 284 U.S. 167, 175; *Armstrong Paint & Varnish Works v. Nu-Enamel Corporation*, 305 U.S. 315, 333; and *United States v. American Trucking Associations*, 310 U.S. 534, 543, 544. As *Holmes, J.*, said in a much-quoted passage from *Johnson v. United States*, 163 F. 30, 32, 18 L.R.A., N.S., 1194: ‘it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.’ See also *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 351; *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381, 391; *United States v. Hutcheson*, 312 U.S. 219, 235. Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”

“Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute”. In affirming, the Supreme Court added (326 U.S. at 409): “The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes as *Church of the Holy Trinity v. U. S.*, 143 U.S. 457, illustrates”.

In *McWilliams v. Commissioner*, 331 U.S. 694, the words of the wash sale exclusion were, “sales or exchanges of property, directly or indirectly * * * between members of a family”. A husband sold a number of shares not to his wife but to an unidentified buyer through a stock exchange broker, and in the same way his wife bought an equivalent from an unidentified seller. The Tax Court held (5 T.C. 623) that the sale did not occur directly or indirectly between the husband and wife. The decision was reversed, *Commissioner v. McWilliams*, 6 Cir., 158 F. (2d) 637, because outside the purpose of the Congress as clearly disclosed in the Report of the House Ways and Means Committee (quoted, 158 F. (2d) at 639), resulting in a conflict with *Commissioner v. Ickelheimer*, 2 Cir., 132 F. (2d) 660. The Supreme Court affirmed the Sixth Circuit decision, concurred in the statement of congressional purpose, and *inter alia* stated that Congress, “with such purpose in mind”, could not have intended to allow the particular claim of a loss deduction “unless it wanted to leave a loop-hole almost as large as the one it had set out to close”. (331 U.S. at 700.) It seems to us

that the inarticulated major premise is the ground stated four centuries ago by Plowden:¹⁷

“It is a good way, when you peruse a statute, to suppose that the law-maker is present and that you have asked him the question you want to know touching the equity, then you must give yourself such answer as you imagine he would have done, if he had been present. * * * And if the law-maker would have followed the equity notwithstanding the words of the

¹⁷Plowden's Rep. 465. Wallace, *The Reporters*, 143, puts the time of Plowden's Reports as “3 Ed. VI—22 Eliz. (1550-1580)” and of Plowden says: “In every sort of professional excellence, Plowden's Reports (or Commentaries, as he styles them) rank among the best Reports of any age. Their author thoroughly understood a reporter's duty, for he tells his readers that before the case came to be argued he had copies made of the record, and took pains to study the points of law arising thereupon; so that, if he had been ‘put to it, he was ready to have argued when the first man began.’ He attended the arguments with the utmost assiduity, and gives them on both sides at length, always following the course of reasoning precisely with the precedents quoted, in the exact style of a formal debate. In reporting the judgment of the court, he gives severally the opinions of the Judges at length; and, in those cases which arose upon demurrers or special verdicts, the pleadings also. To insure the utmost accuracy, after he had drawn out his Reports, he submitted them in many instances to the Judges or Sergeants who argued the points. Cases discussed in this ample way, with all the arguments of each side, considered, distinguished, and commented on by the experience and learning of the bench, must be so thoroughly sifted, says Mr. Reeves, that no one can mistake the grounds or the point of the decision. The labors of Plowden have not failed of their reward. Lord Coke, in one place, speaks of his Reports as ‘exquisite and elaborate,’ and in another assures us that they are, ‘as they well deserve to be, of high account.’ ‘Better authority,’ said Lord Ellenborough, ‘could not be cited.’ ‘They bear, most deservedly,’ is Mr. Hargrave's testimony, ‘as high a character as any book of Reports ever published in our law.’ ‘Distinguished,’ says Chancellor Kent, ‘for authenticity and accuracy, and exceedingly interesting and instructive by the evidence they afford of the extensive learning, sound doctrine, and logical skill of the ancient English bar.’ Similar testimony is found elsewhere. Plowden is one of the very few of the older books prepared for the press, and published in the author's lifetime.”

law * * * you may safely do the like, for while you do no more than the law-maker would have done, you do not act contrary to the law, but in conformity with it."

It is not to be supposed that the Commissioner is a favored litigant. He stands on a forensic and judicial parity with an adversary taxpayer with respect to Plowden's rule. The English saying, "Sauce for the goose is sauce for the gander", perhaps was familiar¹⁸ to Plowden.

Dated, San Francisco, California,

August 24, 1948.

Respectfully submitted,

GEORGE M. NAUS,

Attorney for Petitioner.

¹⁸"English Proverb". Mencken, *A New Dictionary of Quotations*, 1060.

**In the United States Court of Appeals
for the Ninth Circuit**

WILSON BROS. & Co., *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

**On Petition for Review of the Decision of the Tax Court
of the United States**

BRIEF FOR THE RESPONDENT

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OCT 4 - 1948

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INDEX.

	Page
Opinion	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Summary of argument	6
Argument:	
I. The Tax Court properly held that the taxpayer was not entitled to a deduction for depreciation and expenses of two boats in computing the personal holding company surtax.....	7
II. The taxpayer's arguments are not germane to the issue involved..	12
Conclusion	15
Appendix	16

CITATIONS

CASES:

<i>Commissioner v. Affiliated Enterprises</i> , 123 F. 2d 665, certiorari denied, 315 U. S. 812	9
<i>Commissioner v. Lane-Wells Co.</i> , 321 U. S. 219.....	7
<i>Helvering v. Gowran</i> , 302 U. S. 238.....	14
<i>Monroe, Inc. v. Commissioner</i> , decided September 7, 1943.....	8, 12
<i>O'Sullivan Rubber Co. v. Commissioner</i> , 120 F. 2d 845.....	9, 12-13

STATUTES:

Internal Revenue Code:

Sec. 23 (26 U. S. C. 1946 ed., Sec. 23).....	6, 8, 9, 14, 15
Sec. 291 (26 U. S. C. 1946 ed., Sec. 291).....	7
Sec. 500 (26 U. S. C. 1946 ed., Sec. 500).....	16
Sec. 501 (26 U. S. C. 1946 ed., Sec. 501).....	6, 7, 16
Sec. 502 (26 U. S. C. 1946 ed., Sec. 502).....	12, 16
Sec. 505 (26 U. S. C. 1946 ed., Sec. 505).....	6, 7, 8, 9, 10, 11, 14, 15, 17

Revenue Act of 1938, c. 289, 52 Stat. 447:

Sec. 401	17
Sec. 402	17
Sec. 406	17

MISCELLANEOUS:

Treasury Regulations 101, Art. 406-1	8
Treasury Regulations 103, Sec. 19.505-1	8

In the United States Court of Appeals for the Ninth Circuit

No. 11980

WILSON BROS. & Co., *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

**On Petition for Review of the Decision of the Tax Court
of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 30-47) are reported in 10 T. C. 251.

JURISDICTION

This proceeding, as to the single issue on appeal, involves deficiencies in federal personal holding company surtax and penalties for the calendar years 1938 to 1942, inclusive. (R. 48.) On May 29, 1946, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency in taxes. (R. 9.) On August 20,

1946 (R. 2), within ninety days thereafter, the taxpayer filed a petition (R. 4-28) with the Tax Court of the United States for a redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue Code. The final order and decision of the Tax Court finding deficiencies in tax was entered on May 18, 1948. (R. 48.) The case is brought to this Court by a petition for review (R. 48-50) filed June 30, 1948 (R. 50), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Did the Tax Court err in holding that, for the purpose of computing the personal holding company surtax, the taxpayer, a personal holding company, was not entitled to deduct, under the provisions of Section 505 (b) of the Internal Revenue Code, certain amounts claimed on account of depreciation and expenses of two boats during the taxable years 1938 to 1942, inclusive?

STATUTE INVOLVED

The applicable statute is set out in the appendix, *infra*.

STATEMENT

Relevant to the single issue on appeal, the facts as found by the Tax Court (R. 33-38) are as follows:

Wilson Bros. & Company, the taxpayer, is a Nevada corporation with its principal office at San Francisco, California. It filed its tax returns on the accrual basis. During the years 1938 to 1942 the corporation was a personal holding company. (R. 33.)

The corporation was organized in December, 1928, by W. T. Wilson and F. A. Wilson, each of whom paid \$500 for one-half of its capital stock of \$1,000, represented by forty shares, and thereafter they jointly con-

tributed to paid-in surplus \$624,000 and two schooners, the "Oregon" and the "Idaho". Each has since owned twenty shares. The brothers were successfully engaged as partners in the milling, shipping, and selling of lumber on the west coast of the United States. They operated logging camps and sawmills, manufacturing lumber in Washington and shipping it on the two schooners for sale in San Francisco, Los Angeles, and San Diego. The business was begun by their grandfather and continued by their father, and they participated in it from early youth. After 1928 it was conducted by the corporation. The schooner "Oregon", in which the brothers owned a one hundred per cent interest, and the schooner "Idaho", in which they owned a seventy-five per cent interest, were transferred to the corporation at a value of \$175,000. As an additional contribution to paid-in surplus, the brothers on March 20, 1931, transferred to the corporation a bank account of \$480,372.24, which they had received as a gift from their mother. At the time of this transfer it was orally agreed between them that either might at any time make withdrawals not exceeding \$150,000 from the corporation and repay the amounts without interest when convenient to the drawer or necessary for the corporation's business. (R. 33-34.)

With the cash contributions of the brothers, the corporation purchased stocks, principally of domestic corporations. In 1938 and succeeding years its security holdings exceeded \$800,000 in value, and it derived over eighty per cent of its income from dividends. F. A. Wilson, its president and general manager, and W. T. Wilson, its secretary and treasurer, gave attention to its investments. During the taxable years they followed market reports, made some slight changes in holdings, exercised rights, and once purchased stocks with the proceeds of some matured bonds. F. A. Wilson had

charge of maintaining and repairing the two schooners, which were not in use, of finances and collections, and the preparation of tax returns. He and his brother were both active in seeking a purchaser or lessor for the schooners, and in 1939 he made an unsuccessful trip to the northwestern states in search of lumber. He was a member of the San Francisco Stock Exchange and operated a brokerage business. He also looked after his personal security portfolio, containing stocks of a value of about \$200,000. W. T. Wilson kept the corporation's accounts. He also engaged in a retail lumber business at Los Angeles, which he took over from the corporation in 1938 and from which he reported gross income of \$184,000 in 1939, \$127,000 in 1940, and \$187,000 in 1941. He engaged a manager at \$300 a month for this business. In 1938 the corporation ceased to deal in lumber, and its only business was the care of investments and the collection of dividends and a small amount of rent. (R. 35-36.)

The two schooners which were transferred to the corporation were wooden-hull boats of 1,800 tons dead weight, with cargo space for 1,200,000 board feet of lumber. After being operated by the corporation for a part of the year 1929, they were "laid up" because a lull in the lumber market left taxpayer with large unsold stocks on hand. For some years thereafter the brothers expected to put the boats back into service, to ship lumber in them again when market conditions should improve. But in succeeding years such conditions grew worse, and the boats have never been used. They have been kept moored, however, under the care of a watchman, who cleans and paints the superstructure, and at intervals of 15 to 18 months they are placed in drydock for general overhauling, caulking and repairs. While not seaworthy since 1929, they have been maintained in such a condition that they could be made so within a period of sixty to ninety days. (R. 37.)

In 1938, W. T. Wilson took over individually a retail branch of the corporation's business, selling pine to motion picture studios and others from the office and lumber yard which the corporation formerly used. Since that year the corporation has not dealt in lumber or derived any income from its sale. During the years 1938 to 1942, numerous efforts were made to sell or lease the boats; some offers were received, but not accepted. Being of wood, the schooners are inferior to ships having steel hulls and cannot be as readily leased or sold. During the war they were not desired by the Maritime Commission because they were slow and small. (R. 37-38.)

For the years 1938 to 1942, the following amounts were claimed and allowed for income tax purposes as depreciation and expenses connected with the boats (R. 38):

Year	Total	Depreciation	Expenses
1938	\$12,459.96	\$10,002.08	\$2,457.88
1939	15,094.35	10,002.08	5,092.27
1940	15,028.68	10,002.08	5,026.60
1941	16,166.87	10,002.08	6,164.79
1942	12,898.05	10,002.08	2,895.97

The above amounts were not allowed as deductions in the determination of the corporation's personal holding company surtax. The corporation received no rent or other compensation for the use of the boats in 1938, 1939, 1940, 1941, and 1942. The boats were not held in the course of the corporation's business in those years, and were not necessary for the conduct of that business. (R. 38.)

The Commissioner determined deficiencies in personal holding company surtaxes and penalties (R. 32) which amounts were redetermined and substantially re-

duced by the Tax Court (R. 48). The taxpayer petitions for a review of that decision in so far as it relates to the disallowance of a deduction for depreciation and expenses of the boats during the tax years for the purpose of computing the personal holding company surtax. (R. 48-51.)

SUMMARY OF ARGUMENT

The Tax Court properly held that the taxpayer was not entitled to the deductions claimed for depreciation and expenses of two boats in computing the personal holding company surtax net income. During the taxable years, the taxpayer was admittedly a personal holding company within the definition of Section 501 of the Internal Revenue Code. The Tax Court so found and no error is alleged in that regard which would put that question in issue on appeal.

Since the taxpayer is a personal holding company we must look to subchapter A relating to personal holding companies to determine what deductions are allowable in computing the taxable net income.

Since the corporation derived no income, during the taxable years, from the boats it is only entitled to a deduction for expenses and depreciation if it proved that it met the three conditions precedent prescribed by Section 505 (b) of the Internal Revenue Code. The specific limitations prescribed by that section are necessarily controlling over the general provisions allowing a deduction for expenses and depreciation under Section 23 (a) and (1) of the Internal Revenue Code.

A review of the facts and findings of the Tax Court show that the taxpayer did not meet the three requirements of Section 505 (b). It did not establish (1) that rent or other compensation were not obtainable for the boats; (2) that the boats were held in the course of a business carried on *bona fide* for profit; or (3) that

there was reasonable expectation that the operation of the boats would result in a profit or that the boats were necessary to the conduct of the business. In the absence of such a showing the provisions of Section 505 (b) of the Internal Revenue Code deny any allowance for expenses and depreciation in computing personal holding company surtax net income.

An analysis of the taxpayer's arguments shows that they are not germane to the issue involved.

ARGUMENT

I

The Tax Court Properly Held That the Taxpayer was Not Entitled to a Deduction for Depreciation and Expenses of Two Boats in Computing the Personal Holding Company Surtax

During the taxable years, the taxpayer was admittedly a personal holding company within the definition of Section 501 of the Internal Revenue Code (Appendix, *infra*). The Tax Court so found (R. 33) and no error is alleged in that regard which would put that question in issue on appeal (R. 50-51).¹

Since the taxpayer is a personal holding company we must look to subchapter A relating to personal holding companies to determine what deductions are allowable in computing the taxable net income.

Section 505 (b) of the Internal Revenue Code (Appendix, *infra*) limits the general deductions for ex-

¹ Furthermore, if there are deficiencies in personal holding company surtaxes, there can be no question as to the imposition of penalties and no error is alleged in that regard. The taxpayer failed to file personal holding company surtax returns for the years in which a penalty was imposed. This is admitted by the petition for review (R. 49) and no reasonable cause for such failure is shown by the record. The imposition of the penalties was therefore mandatory under Section 291 of the Internal Revenue Code. *Commissioner v. Lane-Wells Co.*, 321 U. S. 219, 224.

penses and depreciation, accorded by Section 23 (a) and (1) of the Internal Revenue Code, to an amount equal to rent or other compensation from the property affected unless it is established (under regulations prescribed by the Commissioner with the approval of the Secretary)² to the satisfaction of the Commissioner that three concurrent conditions exist, namely: (1) That the rent or other compensation received was the highest obtainable, or, if none was received, that none was obtainable; (2) that the property was held in the course of a business carried on bona fide for profit; and (3) either that there was reasonable expectation that the operation of the property would result in a profit, or that the property was necessary to the conduct of the business.

Since the corporation derived no income during the taxable years from the boats, it is only entitled to the deductions claimed if it proves that the above three conditions are fulfilled in respect to them.

The Commissioner having determined in the first instance, in accordance with the express terms of the statute, that the taxpayer had not met the conditions prescribed, the burden before the Tax Court was upon the taxpayer to prove that it came within the requirements of the taxing statute. In that it failed.

The necessity for compliance with the requirements of Section 505 (b) are discussed at some length in *Monroe, Inc. v. Commissioner*, decided September 7, 1943 (1943 P-H T. C. Memorandum Decisions, par. 43,413). In that case the Tax Court held that the mere holding of property for sale did not fulfill the requirements of the statute and said:

² See Section 19.505-1 of Treasury Regulations 103, promulgated under the internal Revenue Code. This is substantially the same as Article 406-1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938.

The very fact that this proceeding is before us shows that the petitioner has not satisfied the respondent that it is entitled to the deduction under section 505 (b), *supra*, and regulations issued thereunder. Thus the respondent's determination must be sustained unless his denial of the deductions was arbitrary and an abuse of discretion. *Stranahan v. Commissioner*, 42 F. (2d) 729, certiorari denied, 283 U. S. 822; *Olympia Harbor Lumber Co. v. Commissioner*, 79 F. (2d) 394; *Connery Coal and Investment Co. v. Commissioner*, 84 F. (2d) 485; *First Securities Corporation of Memphis, Tennessee v. Clements*, 103 F. (2d) 1011; *Western Hide & Fur Co.*, 26 BTA 354; *Walter H. Goodrich & Co.*, 40 BTA 960.

It is obvious, under well-established rules of construction, that the specific limitations of Section 505 (b) are controlling over the general provisions for the allowance of expenses and depreciation under Section 23 (a) and (1) of the Internal Revenue Code.³ Therefore, the issue is narrowed to whether the taxpayer satisfies the conditions of Section 505 (b) and no other. Congress has laid down the pattern and the taxpayer must show that it comes within the conditions prescribed since the courts may not by probing into tax motives undertake to relieve from the harshness of a particular application of the statute. *Commissioner v. Affiliated Enterprises*, 123 F. 2d 665, 667 (C. C. A. 10th), certiorari denied, 315 U. S. 812; *O'Sullivan Rubber Co. v. Commissioner*, 120 F. 2d 845, 848 (C. C. A.

³ Note also that Section 505 (c) of the Internal Revenue Code denies a net loss carry-over and Section 505 (d) denies a capital loss carry-over in computing the net income of personal holding companies although general provisions of the tax laws allow those deductions.

2d). In the above cases the courts held that a corporation falling within the definition of a personal holding company is taxable as such despite the absence of a tax avoidance motive.

As to fulfilling the first requirement of Section 505 (b) of the Internal Revenue Code, it is apparent that the taxpayer failed to show that no rent or other compensation "was obtainable" for the boats during the tax years in question. On the contrary, it was admitted by the brothers that offers to buy or lease the boats were received. (R. 37.) There was no explanation of the reasons for refusing all of these offers. (R. 44.) Admittedly the boats could have been made seaworthy although not in use. (R. 37, 44.) But there was no showing that some income might not have been derived from the boats. The mere fact that no rent or other compensation was received or that attempts to rent were unproductive because the parties interested would not meet taxpayer's terms fails to establish that no rent was obtainable during the taxable years from the property within the meaning of Section 505 (b)(1) of the Internal Revenue Code.

As to fulfilling the second requirement of Section 505 (b) of the Internal Revenue Code, it is also apparent that the boats were not held in the course of a business carried on *bona fide* for profit. Since the taxpayer ceased to deal in lumber in 1938 and the boats were not in active use from 1929 they were not held in the course of the taxpayer's business during the taxable years nor were they necessary to the conduct of its business. The Tax Court so found. (R. 38, 41.)

In 1938 the taxpayer discontinued its lumber business. (R. 45.) The fact that the boats were tied up since 1929 would indicate that they were not held in the course of that business, and obviously they were not

held in the course of any other business carried on by the taxpayer.

In 1938 and subsequent years the assets of the taxpayer consisted almost entirely of securities of a market value in excess of \$800,000. (R. 41, 45.) Certainly such evidence fails to support any conclusion that the boats were held in the course of a business carried on *bona fide* for profit within the meaning of Section 505 (b) (2) of the Internal Revenue Code.

Since the requirements of Section 505 (b) are in the conjunctive, the failure of the taxpayer to meet the conditions prescribed in subdivisions (1) and (2) are a sufficient basis for denying its claims for expenses and depreciation. But with respect to fulfilling the third requirement of Section 505 (b), the record fails to show that there was a reasonable expectation that operation of the boats would result in a profit, or that they were necessary to the conduct of the business.⁴ The Tax Court found that they were not. (R. 38.) The fact that the boats were tied up since 1929 and were in an unseaworthy condition during the taxable years resolves these requirements against the taxpayer. Until such time as the boats could be operated there could be no reasonable expectation that they could be operated at a profit. The fact that by extensive repairs these boats might have been placed in an operating condition is immaterial. The fact remains that the taxpayer was not engaged in the shipping business during the taxable years and the record is silent as to how the boats were necessary to any business conducted by the taxpayer in the taxable years.

Unless the Commissioner's action in disallowing the deduction here claimed is arbitrary or amounts to an abuse of discretion it must be sustained. That was the

⁴ The latter provision is answered in part in connection with the discussion of failure to meet the second requirement of the statute.

holding in *Monroe, Inc. v. Commissioner, supra*, and cases cited in the quotation therefrom above. We submit that the evidence fails to show that the Commissioner's denial of the claimed deductions was arbitrary or an abuse of discretion, and the affirmance of his action by the Tax Court is in accordance with law.

II

The Taxpayer's Arguments are Not Germane to the Issue Involved

The taxpayer (Br. 11-19) sets out *in extenso* the legislative history relating to personal holding companies. Seemingly, the purpose is to show that the taxpayer's business was not one intended by Congress to be subjected to the personal holding company provisions because it was not an "incorporated family pocketbook". (Br. 28-40.) But admittedly the taxpayer was a personal holding company within the definition of Section 501 of the Internal Revenue Code as to stock ownership and its income was derived from the sources, dividends, interest and rent (R. 35-36), as specified in Section 502 (a). During the taxable years its assets consisted almost entirely of securities of a value in excess of \$800,000 and as to the two brothers it was in effect their incorporated pocketbook. (R. 41, 45.)⁵

Similar arguments, that a company was not within the spirit and substance of the legislation, were made when the first personal holding company cases came before the courts. These arguments were rejected on the ground that motive was immaterial if the company otherwise satisfied the provisions of the statute. The whole situation is well summed up in *O'Sullivan Rub-*

⁵ It should be noted that neither in the petition to the Tax Court (R. 4-9) nor in errors assigned in this Court (R. 50-51) does the taxpayer put in issue the question of its status as a personal holding company.

ber Co. v. Commissioner, 120 F. 2d 845 (C. C. A. 2d), where the court said (pp. 847-848):

But, urges the petitioner, the personal holding surtax was enacted to remedy the evil of the "incorporated pocket book," deliberately created to reduce the personal taxes of those who created them, and, therefore, to impose the tax upon a corporation in petitioner's position is a perversion of the Congressional purpose. We may assume that the taxpayer here was not deliberately aiming to relieve its stockholders from personal taxation. It is, however, abundantly clear that Congress, in correcting an evil, is not narrowly confined to the specific instances which suggested the remedy. "Of course, all personal holding companies were not conceived in sin—many were organized for legitimate personal or business reasons; but Congress has made little distinction between the goats and the sheep". In enacting the very section being applied here, Congress was attempting to foreclose the defense, available under section 104 of the Revenue Act of 1932, 26 U. S. C. A. Int. Rev. Acts, page 509, that the accumulation of profits was responsive to a legitimate business need. See Committee on Ways and Means, 73d Cong., 2nd Sess., House Report No. 704, p. 12: "The effect of this system * * * is to provide for a tax which will be automatically levied upon the holding company without any necessity for proving a purpose of avoiding surtaxes." Cf. Committee on Finance, 73d Cong., 2nd Sess., Senate Report No. 558, p. 15. * * * Having before us indisputable proof from the exactitude of Section 351 itself, reinforced by the Committee reports, that Congress wished to establish objective criteria for imposition of the tax, we cannot, by probing into corporate motives, undertake to re-

lieve from the alleged harshness of a particular application of the statute.

We must therefore assume for purposes of this appeal that the taxpayer was taxable as a personal holding company as found by the Tax Court. (R. 33.)

The taxpayer argues (B. 24-25) that the deductions for expenses and depreciation would be allowable if the boats had been held by an individual. That is beside the point because the boats were in fact owned by the corporation, a personal holding company, and allowance of the deductions therefor depends on whether the requirements of Section 505 (b) of the Internal Revenue Code have been met.⁶ In this connection the taxpayer relies upon the amendment of Section 23 allowing to an individual a deduction for non-trade or non-business expenses. But the amendment is confined to an “*individual*” and does not apply to a corporation. The statute is specific.⁷

The taxpayer argues (Br. 26-28) that Section 23 and Section 505 should be integrated for tax purposes. Such

⁶ It is immaterial that the Tax Court may have given a wrong reason in reaching a correct decision. *Helvering v. Gowran*, 302 U. S. 238, 245-246.

⁷ The amendment reads (Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798):

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses*.—

* * * * *

(2) *Non-trade or non-business expenses*.—*In the case of an individual*, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income. (Italics supplied.)

an argument ignores the fact that, for purposes of the surtax, a personal holding company must first satisfy the requirements of Section 505 (b) before a deductible allowance for expenses and depreciation can be made under Section 23 of the Internal Revenue Code.⁸ The specific statute, Section 505 (b), is controlling over the general provisions of Section 23. See our discussion of this point under Argument I, *supra*.

CONCLUSION

On the record made, the decision of the Tax Court is in accordance with law and should therefore be affirmed.

Respectfully submitted,

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Attorney General.*

October, 1948.

⁸ It should be noted that for income tax purposes the taxpayer was allowed a deduction for expenses and depreciation of the boats for the taxable years. (R. 38.)

APPENDIX

Internal Revenue Code:

SUBCHAPTER A—PERSONAL HOLDING COMPANIES

SEC. 500. SURTAX ON PERSONAL HOLDING COMPANIES.

There shall be levied, collected, and paid, for each taxable year beginning after December 31, 1938, upon the undistributed subchapter A net income of every personal holding company (in addition to the taxes imposed by chapter 1) a surtax equal to the sum of the following: [Here follow scheduled rates.] (26 U. S. C. 1946 ed., Sec. 500.)

SEC. 501. DEFINITION OF PERSONAL HOLDING COMPANY.

(a) *General Rule.*—For the purposes of this subchapter and chapter 1, the term “personal holding company” means any corporation if—

(1) *Gross income requirement.*—At least 80 per centum of its gross income for the taxable year is personal holding company income as defined in section 502; but if the corporation is a personal holding company with respect to any taxable year beginning after December 31, 1936, then, for each subsequent taxable year, the minimum percentage shall be 70 per centum in lieu of 80 per centum, until a taxable year during the whole of the last half of which the stock ownership required by paragraph (2) does not exist, or until the expiration of three consecutive taxable years in each of which less than 70 per centum of the gross income is personal holding company income; and

(2) *Stock ownership requirement*.—At any time during the last half of the taxable year more than 50 per centum in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals.

* * * * *

(26 U. S. C. 1946 ed., Sec. 501.)

SEC. 505. SUBCHAPTER A NET INCOME.

* * * * *

(b) *Deductions Not Allowed*.—The aggregate of the deductions allowed under section 23 (a), relating to expenses, and section 23 (1), relating to depreciation, which are allocable to the operation and maintenance of property owned or operated by the corporation, shall be allowed only in an amount equal to the rent or other compensation received for the use of, or the right to use, the property, unless it is established (under regulations prescribed by the Commissioner with the approval of the Secretary) to the satisfaction of the Commissioner:

(1) That the rent or other compensation received was the highest obtainable, or, if none was received, that none was obtainable;

(2) That the property was held in the course of a business carried on bona fide for profit; and

(3) Either that there was reasonable expectation that the operation of the property would result in a profit, or that the property was necessary to the conduct of the business.

* * * * *

(26 U. S. C. 1946 ed., Sec. 505.)

Substantially the same provisions as above are contained in the Revenue Act of 1938, c. 289, 52 Stat. 447, Sections 401, 402 and 406.

No. 11,980

IN THE

United States Court of Appeals
For the Ninth Circuit

WILSON BROS. & Co.,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

REPLY BRIEF FOR PETITIONER.

GEORGE M. NAUS,

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FILED

OCT 11 1948

PAUL P. O'BRIEN, V.
CLERK

Table of Authorities Cited

Cases	Page
O'Sullivan Rubber Co. v. Commissioner, 2 Cir., 120 F. 2d 845	1

Statutes	
Revenue Act of 1934:	
Section 102	2
Section 351	2
Section 351(b)(1)	1
Revenue Act of 1936	2
Revenue Act of 1937	2

No. 11,980

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILSON BROS. & Co.,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

REPLY BRIEF FOR PETITIONER.

May it please the Court:

Of the 17 pages of the brief for the respondent only one (page 13) attempts to touch the point of the review. The remainder either duplicate uncontroverted matter stated in our opening, or show the literal application of the statute to the facts found.

Respondent's page 13 merely presents a quotation from *O'Sullivan Rubber Co. v. Commissioner*, 2 Cir., 120 F. 2d 845. That case was correctly decided, but does not touch our review point. There, the amount of undistributed net income for the tax year 1935 was not disputed, and the corporation fell within the statutory definition of a "personal holding company" under Act 1934, § 351(b)(1). That was the Act and section that originated the levy of a surtax

on “undistributed” income of a “personal holding company”. It compelled distribution of at least 80 per cent of income, thereby through a fixed percentage eliminating the difficulties under § 102 of reaching undistributed income of corporations generally when accumulated without distribution. §§ 102 and 351 simply divided corporations into two mutually exclusive classes with respect to the Commissioner’s taxing reach of accumulations. The respective *fields of application* of the two sections were within clear legislative intent. In result, each section was a taxing statute, an *independent* one.

Three years later in 1937 came the Act of that year—not an ~~and~~ independent taxing statute, but a dependent statute aimed generally against evasion loopholes in the taxing statute, which had become the Act of 1936. It was not aimed at personal holding companies alone, but at evasion generally. The act of 1937 was a *dependent* statute.

It is to those distinctions that our opening brief was addressed, and the brief for respondent contains no real answer.

Dated, San Francisco, California,
October 11, 1948.

Respectfully submitted,

GEORGE M. NAUS,

Attorney for Petitioner.

No. 11,981

IN THE
United States Court of Appeals
For the Ninth Circuit

LAWRENCE JAMES CONLEY,	}	<i>Appellant,</i>
VS.		
UNITED STATES OF AMERICA,		

BRIEF FOR APPELLEE.

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FILED

OCT 28 1948

PAUL P. O'BRIEN,

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Subject Index

	Page
The indictment	1
Appellant's assignment of error	2
Facts of the case	2
Argument	5
Conclusion	12

Table of Authorities Cited

Cases	Page
U. S. v. Lepowitch, Mo. 1943, 63 S. Ct. 914, 318 U. S. 702, 87 L. Ed. 1091, rehearing denied, 63 S. Ct. 1171, 319 U. S. 783, 87 L. Ed. 1727	7

Statutes	
18 USCA Section 76	2

No. 11,981

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LAWRENCE JAMES CONLEY,	}
vs.	
UNITED STATES OF AMERICA,	
	<i>Appellant,</i>
	<i>Appellee.</i>

BRIEF FOR APPELLEE.

Appeal from a judgment and order made by the United States District Court for the Northern Division of the Northern District of California, sentencing appellant for violation of Title 18, U.S.C.A., 76, the impersonation of a United States Naval Officer. The Court ordered that appellant be imprisoned for a period of eighteen months and judgment was entered accordingly.

THE INDICTMENT.

The indictment charges the defendant, Lawrence James Conley, in one count as follows:

That on or about the 17th day of April, 1948, at Sacramento, in the County of Sacramento, State of California, in said Division and District and within

the jurisdiction of this Court, with intent to defraud one Rev. Rex Barron, Lawrence James Conley did unlawfully, wilfully and feloniously, falsely assume and pretend to be an officer of a department of the United States, to-wit: the United States Navy, acting under the authority of said United States Navy, to-wit: A lieutenant commander in the United States Navy, and in such pretended character did unlawfully, wilfully and feloniously obtain from said Rev. Rex Barron the sum of Ten Dollars (\$10.00) good and lawful money of the United States.

18 USCA Section 76.

APPELLANT'S ASSIGNMENT OF ERROR.

Appellant assigns the following as constituting error in the trial of the case:

1 That certain evidence introduced in the trial was illegally obtained.

2. In general, that improper conduct on the part of the officers of the Government and the Court has resulted in a denial of due process of law in connection with the prosecution and resulting conviction of appellant.

FACTS OF THE CASE.

The circumstances concerning the particular charge, impersonation of a United States Naval Officer, for which appellant stood trial and which resulted in a

verdict of guilty returned by the jury in the case, are as follows:

At approximately 11:00 A.M. on the morning of April 17, 1948, the defendant while attired in the full uniform designating the rank of Lieutenant Commander in the United States Navy, called at the office of a Reverend Rex A. Barron, a minister of the Episcopal church located in the City of Sacramento, and at such time introduced himself to the Reverend as a Lieutenant Commander in the United States Navy, giving his station as Fresno, California, in the 12th Naval District. In connection with the introduction, the appellant tendered a card to the Reverend which set forth that the bearer was a "Harry E. Tomlin, Lieutenant Commander, U.S.N.; Public Relations Officer, 12th Naval District, Fresno, California. (Tr. page 16.) The appellant then stated to the Reverend that he was in a bad situation in that he was due back at his Navy base and was presently financially embarrassed. The appellant further indicated that assistance was desired for the purpose of returning to his Navy base.

In connection with the financial difficulties it was stated to Reverend Barron by the appellant that appellant had lost his wallet the prior evening while staying at a local hotel. (Tr. page 27.) In this connection, it was stated that he, the appellant, had awakened that morning (April 17, 1948) to discover his wallet and his money gone (Tr. page 27), and that his failure to promptly return to Fresno would result in his "absent without leave." (Tr. page 27.)

The Reverend then believing that appellant was as stated, a Lieutenant Commander in the United States Navy and also believing the story related by appellant, sympathized with the appellant for the apparent situation which existed. The Reverend stated at that time that he did not have any cash upon his (the Reverend's) person but that he did have a check payable to him (Rev. Barron) which he would endorse and give to appellant for the purpose of aiding the appellant in returning to his base. (Tr. page 19.) The Reverend then did endorse the check in the amount of \$10.00 and turned it over to the appellant and the appellant accepted such check at that time. The Reverend then directed the appellant to go to a nearby drug store for the purpose of cashing and receiving the face value of said check. Also, the Reverend called the drug store and spoke to a Mr. Higgs with whom he was acquainted requesting that Mr. Higgs cash the check upon presentation by the appellant. (Tr. page 20.) The appellant then proceeded to the drug store referred to, presented the check in the amount of \$10.00, and received in turn that amount of money which was handed to him by Mr. Higgs. (Tr. page 32.)

The circumstances further disclosed that there was no such individual by the name of Harry Tomlin listed in the records for either the 12th Naval District or the United States Navy, as an officer. (Tr. pages 29-30.) It was also disclosed that the clothing or uniform worn by appellant on April 17, 1948, constituted the complete attire symbolic of the uniform of a Lieutenant Commander in the United States Navy. The

appellant was also fully attired in such uniform at the time he was taken into custody on the evening of April 21, 1948, at the Sacramento Hotel where appellant had rented a room.

Appellant went to trial on the above charge set forth in the indictment on May 21, 1948, and after presentation of evidence as outlined was found guilty as charged by a verdict returned on that date by a trial jury. On June 4, 1948, the defendant appeared in Court *in propria persona* having theretofore and on May 11, 1948, waived the right to be represented by counsel and was sentenced by the Court to the federal penitentiary for a period of eighteen (18) months.

ARGUMENT.

It is respectfully submitted that a review of the Transcript of Record in this case will disclose no denial of due process to appellant in connection with the prosecution and resultant conviction. To the contrary it is submitted that from the time appellant first appeared in Court for arraignment up until the time of his final appearance on June 4, his constitutional rights were fully protected and that in addition thereto he was given every courtesy both by members of the Federal Bureau of Investigation and the United States Marshal's Office as well as by the officers of the Court. The appellant appeared in Court on May 11th and after having been informed that he was entitled to be represented by counsel appointed by

the Court stated that he did not wish such representation and desired to proceed in his own behalf. There can be no claim and none is presented to the effect that any rights of the appellant were prejudiced in this respect. Also, an examination of the Transcript of Record will disclose that during the actual trial of the case and presentation of the evidence the Court was most zealous in protecting the rights of appellant pertaining to the admissibility of evidence. (Tr. pages 40, 43.)

It is further submitted that the evidence in support of the judgment in the instant case, to-wit: impersonation of a United States Naval officer, is more than adequate by consideration of Reverend Rex Barron's testimony standing alone. As heretofore set forth, the Reverend has unqualifiedly testified that appellant came to him dressed as a Naval officer and after stating that he was such an individual obtained "something of value" by the exercise of deceit and fraud in the relating of a hard-luck story. It would appear that the actions and conduct on the part of the appellant satisfy every element required by the provisions of Section 76, Title 18, so far as constituting a violation. It is not believed that further language should be devoted to the matter of law so far as the discussion of conduct constituting fraud. It is a well established rule of law that the "intent to defraud" may flow from the actions and conduct of a party without the requirement of the spoken word. The element of intent to defraud which is a necessary matter of proof in so far as violation of Section 76, Title 18, is concerned

is fully disclosed by the very conduct of appellant in and of itself. The case of *U. S. v. Lepowitch*, Mo. 1943, 63 S. Ct. 914, 318 U. S. 702, 87 L. Ed. 1091, rehearing denied, 63 S. Ct. 1171, 319 U. S. 783, 87 L. Ed 1727, fully supports the position of the Government as applied to the circumstances of the instant case.

Reference to Reverend Barron's testimony (Tr. page 25) discloses beyond any question that at the time the Reverend turned the \$10.00 check over to appellant he did so upon the importuning of appellant and believing appellant to be an officer in the United States Navy and that he needed the money to return to his Navy base.

The testimony of other witnesses above referred to supplies the proof that appellant was not on April 17, 1948, an officer in the United States Navy or even a member of such Government installation.

The Government has purposely refrained up to this point in commenting on other matters set forth in appellant's brief as it is believed that those matters have no proper place in connection with the present appeal. However, in such regard it might be stated that it is true that appellant was originally charged with a misdemeanor, to-wit: violation of Title 10, Section 1393, the illegal wearing of a uniform. The U. S. Commissioner's complaint in this regard was filed on April 22, 1948, the morning after the arrest of appellant and at that time the circumstances concerning his activities with Rev. Barron had not been brought to the attention of the Federal Bureau of Investigation. At

the time of the hearing before the United States Commissioner and after having been informed of the charge against him the appellant indicated a desire to go into Court and enter a plea of guilty. In passing it might be stated that at the time of the hearing before the Commissioner, the appellant was still attired in the uniform of a Lieutenant Commander in the Navy.

A day or so subsequent thereto it was determined that appellant had procured the sum of money from Reverend Barron and it was deemed he was guilty of an additional violation, to-wit: impersonation of a United States Naval Officer. Appellant was given a hearing before the Commissioner on this subsequent charge and again indicated his desire to enter a plea of guilty by waiving the right to have his case presented to the Federal Grand Jury and by entering a plea of guilty to an information.

On April 28, 1948, the Court appointed Mr. Daniel Dennis to represent appellant in connection with this subsequent charge and after consultation with appellant Mr. Dennis appeared in Court with appellant on this same date and stated that appellant appeared reluctant to further proceed or enter a plea of guilty at that time. The Court thereupon directed the Government to present the matter to the Federal Grand Jury which was done and on May 21, 1948, the Federal Grand Jury for this Division returned an indictment against appellant as above set forth. It was thereafter, and on May 11, 1948, that appellant indicated his desire to proceed *in propria persona* and at that

time entered a plea of not guilty. The case went to trial on May 21 and resulted in a verdict of guilty as above indicated. The appellant did not at any time make any complaint to this Government representative concerning any heart condition and/or need for medical attention and did not at any time in open court or elsewhere make any such request as set forth in appellant's brief.

It should be further stated in connection with appellant's claims of improper treatment on the part of Special Agents of the Federal Bureau of Investigation that the questioning of appellant by such agents on the evening of April 21st was prolonged by appellant's statements to such officers at the time of his arrest. In this regard appellant volunteered information to such agents stating that he, the appellant, had been in company with one Lloyd Sampsell during the period of time from March 25, 1948, and up until the evening of his arrest on April 21, 1948. The individual Lloyd Sampsell referred to by appellant was on the evening of April 21 and is at the present time a federal fugitive from justice on a warrant issued out of the Southern District of California for the crime of murder alleged to have been committed in connection with the robbery of the Seaboard Finance Company, San Diego, California. For this reason the arresting agents did question appellant seeking to gain information as to the then present location of the said Lloyd Sampsell. Any statements made by him at said time were entirely voluntary. There was no brutal or severe questioning by any government agent or any one else.

After the interrogation had proceeded for some period of time the appellant then informed the agents that he was just "building up a good story," and further investigation by the Federal Bureau of Investigation disclosed that appellant's statement in regard to Lloyd Sampsell had been a pure fabrication.

There was not at any time during the interrogation above referred to any brutality, duress, or coercion employed in any manner whatsoever by the members of the Federal Bureau of Investigation, and it is submitted that appellant at no time up until the preparation of his brief so indicated any improper treatment to the Court, to his attorney that represented him for a brief period, or to any other person.

Reference to the transcript (Tr. page 50) will disclose that the only firearm exhibited to appellant was one in the hand of Corporal Leslie Covack, a member of the Army Military Police, and was used by such officer to prevent the escape of appellant at the time of his original arrest. No members of the Federal Bureau of Investigation were present at this time but arrived at the Sacramento Hotel subsequent to and after having received a call from the military authorities.

The agents of the Federal Bureau of Investigation have further informed this representative of the Government that on the evening of the arrest it was noticed that appellant's ankles appeared to be swollen and that he was asked if he desired the attention of a doctor. Appellant replied stating that the condition of the ankles had existed for some time and that the at-

tentions of a doctor was not desired. Again it is pointed out that appellant did not at any time make any complaint in this respect to the Court or to any of the officers of the Government including members of the U. S. Marshal's Office under whose custody he was placed.

As stated, although it is appreciated that the matters above set forth are not in issue in so far as the present appeal is concerned, it is nevertheless believed that there is an obligation on the part of this Government representative to defend the organization of the Federal Bureau of Investigation and the members thereof, when an attack such as has been made by appellant has been directed against such government department alleging the use of improper and vicious methods in the enforcement of the law. It is submitted that there is no basis whatsoever nor any evidence to support the untruths set forth by appellant.

It is respectfully submitted that at no time from the date of appellant's arrest on April 21 and up until his final appearance in Court on June 4, 1948, was there any action or conduct on the part of any Government representative resulting in a denial of due process of law or effecting any unfair prejudice as to the rights of appellant in connection with the prosecution of instant case. The evidence is overwhelmingly in support of the verdict as returned by the jury.

CONCLUSION.

It is submitted that the judgment should be affirmed.

Dated, Sacramento, California,
October 20, 1948.

FRANK J. HENNESSY,
United States Attorney,
HARLAN M. THOMPSON,
Assistant United States Attorney,
EMMET J. SEAWELL,
Assistant United States Attorney,
Attorneys for Appellee.

No. 11982

United States
Court of Appeals
for the Ninth Circuit

E. F. SMITH,

Appellant,

vs.

JIM DANDY MARKETS, INC., FIREMAN'S
FUND INSURANCE COMPANY, CENTRAL
MANUFACTURERS' MUTUAL INSURANCE
COMPANY, and INDIANA LUMBERMEN'S
MUTUAL INSURANCE COMPANY,

Appellees,

and

CENTRAL MANUFACTURERS' MUTUAL IN-
SURANCE COMPANY, and INDIANA LUM-
BERMEN'S MUTUAL INSURANCE COM-
PANY,

Appellants,

vs.

JIM DANDY MARKETS, INC.,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

SEP 11 1948

No. 11982

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for the Southern District of California,
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer of E. F. Smith to Complaint.....	19
Exhibit A—Agreement dated July 1, 1945, E. F. Smith, party of first part, Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, parties of second part.....	27
Exhibit B—Agreement dated June 12, 1946, E. F. Smith and Jim Dandy Markets.....	40
Set out as Plaintiff's Exhibit 7 at page....	65
Answer of E. F. Smith to Cross-Claim of Jim Dandy Markets, Inc.....	97
Answer of Fireman's Fund Insurance Company to Complaint	10
Answer of Jim Dandy Markets, Inc., to Com- plaint	12
Answer of Jim Dandy Markets, Inc., to Cross- Claim of E. F. Smith.....	44
Exhibit A—Lease dated Sept. 29, 1941, be- tween E. F. Smith, Lessee, and Charles E. and Daisy Kindig as Lessors.....	56
Exhibit B—Lease dated Feb. 1, 1942, between E. F. Smith and Thomas A. McLenaghan, Administrator	60

	PAGE
Exhibit C—Supplementary Agreement dated June 12, 1946, E. F. Smith and Jim Dandy Markets	65
Exhibit D—Escrow Instructions and Modified Ecrow Instructions	74
Exhibit E—Bill of Sale dated June 27, 1946, E. F. Smith in favor of Jim Dandy Markets	84
Exhibit F—Assignment of Lease dated June 27, 1946, E. F. Smith in favor of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster.....	86
 Appeal:	
Certificate of Clerk to Transcript of Record on	215
Designation of Record on (Central Mfgr's Mutual Ins. Co.).....	137
Designation of Record on (E. F. Smith)....	132
Notice of (Central Mfgrs. Mutual Ins. Co. et al.)	134
Notice of (E. F. Smith).....	131
Order Transmitting Plaintiff's Original Ex- hibits 2, 3, and 4 on.....	214
Statement of Points on (Central Mfgrs. Mu- tual Ins. Co., et al.).....	135
Statement of Points and Designation of Rec- ord on (Appellant Smith—USCA).....	309
Stipulation and Order re Plaintiff's Original Exhibits Nos. 2, 3 and 4 on.....	314

	PAGE
Certificate of Clerk to Transcript of Record on Appeal	215
Complaint for Declaratory Relief.....	2
Cross-Claim of E. F. Smith against Jim Dandy Markets, Inc.	41
Exhibit C—Assignment of Leases held by E. F. Smith to Jim Dandy Markets.....	44
Set out in full as Plaintiff's Exhibit 10.....	86
Cross-Claim of Jim Dandy Markets, Inc., against E. F. Smith.....	91
Decision and Order.....	99
Designation of Record on Appeal (Central Mfgs. Mutual Ins. Co.—DC).....	137
Designation of Record on Appeal (E. F. Smith —DC)	132
Designation of Record, Statement of Points and (E. F. Smith—USCA).....	309
Findings of Fact and Conclusions of Law.....	107
Judgment	128
Names and Addresses of Attorneys.....	1
Notice of Appeal of Central Mfgs. Mutual Ins. Co., et al.	134
Notice of Appeal of E. F. Smith.....	131

Order Transmitting Plaintiff's Original Exhibits 2, 3 and 4 (DC).....	214
Order re Plaintiff's Original Exhibits, Stipulation and (USCA).....	314
Statement of Points on Appeal (Central Mfgs. Mutual Ins. Co., et al.—DC).....	135
Statement of Points and Designation of Record on Appeal (E. F. Smith—USCA).....	309
Stipulation and Order re Plaintiff's Original Exhibits Nos. 2, 3 and 4 (USCA).....	314
Transcript of Testimony and Proceedings.....	217
Exhibits for Defendant:	
A—Sub-Lease, E. F. Smith to Jim Dandy Markets, dated July 1, 1945.....	266
Set out in full at page.....	195
B—Inventory of Fixtures, Equipment and Machinery	267
Set out in full at page.....	207
Exhibits for Plaintiff:	
1—Transcript of Pre-Trial Hearing.....	244
Set out in full at page.....	139
5—Lease dated Sept. 29, 1941, between E. F. Smith, Lessee, and Charles E. and Daisy Kindig as Lessors	247
Set out in full at page.....	56

Exhibits for Plaintiff—(Cont'd)

6—Lease dated Feb. 1, 1942, between E. F. Smith and Thomas A. McLenaghan, Administrator	248
Set out in full at page.....	60
7—Supplementary Agreement dated June 12, 1946, E. F. Smith and Jim Dandy Markets	249
Set out in full at page.....	65
8—Escrow Instructions and Modified Escrow Instructions	249
Set out in full at page.....	74
9—Bill of Sale dated June 27, 1946, E. F. Smith in favor of Jim Dandy Markets..	250
Set out in full at page.....	84
10—Assignment of Lease dated June 27, 1946, E. F. Smith in favor of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster.....	250
Set out in full at page.....	86
11—Adjusters Agreement dated April 9, 1947	251
Set out in full at page.....	193
12—Letter, March 20, 1947, Jim Dandy Markets, Inc., to Morrison Escrow Co.....	257
Set out in full at page.....	204

Exhibits for Plaintiff—(Cont'd)

13—Agreement dated July 1, 1945, E. F. Smith, party of first part, Charles Schuster, Leo J. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, parties of second part.....	258
Set out in full at page.....	27

Witness for Defendants:

Smith, E. F.

—direct	271
—cross	281

Witnesses for Defendant, E. F. Smith:

Cassidy, Thomas V.

—direct	294
—cross	301

Johnston, James R.

—direct	282
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Smith, E. F.

—direct	303
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For Appellee Fireman's Fund Insurance Co.:

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Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division.

No. 6838-PH

CENTRAL MANUFACTURERS' MUTUAL
INSURANCE COMPANY, a Corporation,
INDIANA LUMBERMENS MUTUAL
INSURANCE COMPANY, a Corporation,
Plaintiffs,

vs.

JIM DANDY MARKETS INCORPORATED,
a Corporation,
FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,
E. F. SMITH,
Defendants.

COMPLAINT FOR DECLARATORY RELIEF

I.

That this court has jurisdiction over the above entitled action by reason of the following facts, the particulars of which are hereafter more fully alleged: a diversity of citizenship exists between plaintiffs and each of the defendants, and the amount involved in this action is in excess of \$3,000.00 exclusive of interest and costs of suit. [2]

II.

That the plaintiff Central Manufacturers' Mutual Insurance Company is now, and at all the times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the

State of Ohio, and was and is a citizen of the State of Ohio, and is now and was at all times hereinafter mentioned authorized to do business in the State of California and to write policies of fire insurance in said State, and was and is actually engaged in the business of writing said policies in said State of California at all of the times hereinafter mentioned.

III.

That the plaintiff Indiana Lumbersmens Mutual Insurance Company, is now and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Indiana, and was and is a citizen of the State of Indiana, and is now and was at all times hereinafter mentioned authorized to do business in the State of California and to write policies of fire insurance in said State, and was and is actually engaged in business of writing said policies within said State of California at all of the times hereinafter mentioned.

IV.

That the defendant Jim Dandy Markets, Incorporated, is now and at all of the times hereinafter mentioned was, a corporation duly organized under the laws of the State of California, and was at all of the times hereafter mentioned a citizen of the State of California, and is now and was at all of the times hereafter mentioned authorized to and was actually engaged in business in the State of California.

V.

That the defendant Fireman's Fund Insurance Company, is now and at all of the times hereafter mentioned, was a corporation duly organized under the laws of the State of California, and is [3] and was at all of the times hereafter mentioned a citizen of the State of California and is now and was at all of the times hereafter mentioned authorized to do business in the State of California and to write policies of fire insurance in said State, and was and is actually engaged in the business of writing said policies within said State of California at all of the times hereafter mentioned.

VI.

That the defendant E. F. Smith is now and was at all of the times hereafter mentioned, a resident and citizen of the State of California, residing in the Southern Judicial District of said State.

VII.

That by reason of the facts hereinbefore alleged there is diversity of citizenship between plaintiffs and each of them and all of the defendants above mentioned.

VIII.

That the amount in controversy in this action exceeds the sum of \$3,000.00, exclusive of interest and costs.

IX.

That on, to-wit, July 19, 1946, plaintiff Central Manufacturers' Mutual Insurance Company, issued its Standard California Fire Insurance Policy No. F-321452, whereby, for the period from the 19th

day of July, 1946 at noon, to the 19th day of July, 1949 at noon, it insured Charles Schuster, Leo A. Goldberg, Norman Schuster, Max M. Berick and Earl I. Swetow, doing business as Jim Dandy Markets against all loss or damage by fire except as thereafter provided, to an amount not exceeding \$12,500.00, the premises described as: "One-Story, composition roof, Frame D. Class Building at 6801 Atlantic Boulevard, in the City of Bell, in the County of Los Angeles, in the State of California," including foundations, sidewalks, plumbing, [4] electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales, machinery and elevators, if belonging to and constituting a part of said building.

X.

That thereafter by written endorsement dated October 7, 1946, the name of the insured was changed to read Jim Dandy Markets, a corporation.

XI.

That on, to-wit, July 19, 1946, plaintiff Indiana Lumbermens Mutual Insurance Company issued Standard California Fire Insurance Policy No. 3170, whereby for the period from the 19th day of July, 1946 at noon, to the 19th day of July, 1949 at noon, it insured Charles Schuster, Leo A. Goldberg, Norman Schuster, Max M. Berick and Earl I. Swetow, doing business as Jim Dandy Markets, against all loss or damage by fire except as thereafter provided, to an amount not exceeding \$12,-

500.00, the premises described as: "One-Story, composition roof, Frame D Class Building at 6801 Atlantic Boulevard, in the City of Bell, in the County of Los Angeles, in the State of California, including foundations, sidewalks, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales, machinery and elevators, if belonging to and constituting a part of said building.

XII.

That thereafter by written endorsement dated July 19, 1946, the name of the insured was changed to read Jim Dandy Markets, a corporation.

XIII.

That subsequent to said July 19th, 1946, and prior to [5] the date of the fire hereinafter referred to, to-wit: January 14, 1947, the exact time of which is unknown to these plaintiffs, the defendant Fireman's Fund Insurance Company, issued its Standard California Fire Insurance Policy No. A-959495, whereby it insured the defendant E. F. Smith, as the named assured, against loss and damage by fire to the premises hereinbefore described in the amount of \$16,700.00, and that said policy, as plaintiffs are informed and believe, and upon such information and belief allege the fact to be that said policy continued in full force and effect at the time of the loss and damage to said premises from fire on January 14, 1947, as hereafter alleged.

XIV.

That by the terms and conditions of the said California Standard Fire Insurance Policies issued by each of said plaintiffs, and also by the said policy issued by defendant Fireman's Fund Insurance Company, as the plaintiffs are informed and believe, and upon such information and belief, allege the fact to be it was provided with reference to an apportionment of loss from fire as follows: "This Company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, or expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property, whether valid or not, or by solvent or insolvent insurers."

XV.

That the plaintiffs are informed and believe, and upon such information and belief allege the fact to be, that the entire insurance covering the said property hereinbefore described and insured by these plaintiffs, and defendant Fireman's Fund Insurance Company, at the time of the loss sustained by fire as aforesaid, was and is the sum of \$41,700.00 as follows: Central Manufacturers' Mutual Insurance Company, Policy No. F-321452 for \$12,500.00; [6] Indiana Lumbermens Mutual Insurance Company, Policy No. 3170 for \$12,500.00; Fireman's Fund Insurance Company, Policy No. A-94195 for \$16,700.00.

XVI.

That an actual controversy has arisen between the plaintiffs and defendants as to whether the Jim

Dandy Market, a corporation, has an insurable interest in the property described in the plaintiffs' said policies at the time of the fire, and whether the defendant E. F. Smith, had an insurable interest in said property at the time of the fire.

That a further controversy has arisen as to whether the plaintiffs are liable for the full principal sum of their respective policies, to-wit, \$12,500.00 each, by reason of the agreed loss of \$32,476.92, or whether the liability of said plaintiffs is respectively limited to the proportion of the loss that the amount respectively insured by them bears to the entire insurance covering said property, to-wit, the sum of \$41,700.00.

XVII.

That the defendant E. F. Smith is a party interested in and directly affected by the controversies hereinbefore alleged, and that he is joined in this action because of his said interest in said controversies, but that these plaintiffs do not know what, if any, contentions are made by said defendants, or any of them with reference to said controversies.

XIX.

That plaintiffs have commenced this action and made the allegations hereinbefore set forth in good faith, and desiring to have their rights and liabilities under said policies of insurance, construed and determined to the end that they may proceed with the payment of the loss under their respective policies, if they are legally liable therefor, and if the defendant Jim Dandy Markets, a corporation, has an insurable interest in said buildings, and [7] in order that the court may determine whether the

Apportionment of Loss Clause in its said policies is applicable in view of the coverage of the policy issued by the Fireman's Fund Insurance Policy, with loss payable to defendant E. F. Smith.

Wherefore, plaintiff prays judgment and for an order and decree herein to the end that the plaintiffs may obtain relief in the premises and declaratory judgment as follows:

1. For a declaration by this court of the respective rights and duties and liabilities of the plaintiffs and defendant, Fireman's Fund Insurance Company, under the respective policies of insurance issued by them and which are in this complaint described.

2. That there be declared by this court who has the insurable interest in the premises described in said policies as between defendant Jim Dandy Markets, a corporation, and defendant E. F. Smith.

3. That it be declared and adjudged by this court whether the insurance under the policy issued by the defendant Fireman's Fund Insurance Company covers the premises described in plaintiffs said complaint, in such a manner that the Apportionment of Loss Clause of plaintiffs' said policies apply and is effective.

4. Plaintiffs pray for such other and further relief as to this Honorable Court shall seem just and equitable, and for all costs of suit herein.

THOMAS P. MENZIES and
HAROLD L. WATT,

By /s/ THOMAS P. MENZIES,

Attorneys for Plaintiffs.

[Endorsed]: Filed April 22, 1947. [8]

[Title of District Court and Cause.]

ANSWER

Comes now defendant, Fireman's Fund Insurance Company, a corporation, and for Answer to plaintiff's Complaint:

I.

As to the allegations of Paragraph XIII of Plaintiffs' Complaint, defendant admits that prior to the fire of January 14, 1947, referred to in said paragraph, that this defendant had entered into a contract of insurance with E. F. Smith and had issued its Standard California Fire Insurance Policy No. A-959495, whereby it insured defendant E. F. Smith against loss and damage by fire to building located at 6801 Atlantic Boulevard, Bell, California, with certain appurtenances thereto excepted from said insurance for an amount not exceeding \$16,700.00, but denies that said contract was [9] made or entered into subsequent to July 19, 1946, and alleges that said contract of insurance was made and entered into between this defendant and defendant E. F. Smith on July 5, 1945, and denies that said policy continued in full force and effect at the time of the loss and damage to said premises by fire on Jan. 14, 1947, and denies that said policy was in full force and effect at said time, to-wit: on January 14, 1947.

II.

As to the allegations contained in Paragraph XV of plaintiffs' complaint, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in said Paragraph XV.

III.

As to the allegations contained in Paragraph XVI of plaintiffs' Complaint, this defendant denies said allegations and each and every allegation, matter, and thing therein contained.

Further pleading, this defendant alleges:

I.

That plaintiffs' Complaint fails to state a claim against this defendant upon which the relief prayed for, or any relief, can be granted against this defendant in that it appears upon the face thereof that the only controversy to which this defendant is a party or is interested in is one between this defendant and E. F. Smith, and that a determination of such controversy could not be had in this Court for the reason that the said E. F. Smith and this defendant are each and both citizens and residents of the State of California and no diversity of citizenship or other jurisdictional grounds exist to give this Court jurisdiction to determine said controversy. [10]

Wherefore, this defendant prays that plaintiffs take nothing by their Complaint and that defendant go hence and have and recover its costs and disbursements herein.

/s/ E. EUGENE DAVIS,
HINDMAN & DAVIS,

By /s/ E. EUGENE DAVIS,
Attorneys for Defendant, Fireman's Fund Insurance Company.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed May 10, 1944. [11]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, JIM DANDY
MARKETS, INC., SUED HEREIN AS
JIM DANDY MARKETS, INCOR-
PORATED

Comes now the defendant, Jim Dandy Markets, Inc., erroneously sued herein as Jim Dandy Markets, Incorporated, and answering for itself and not for any other defendant, admits, denies and alleges:

I.

Admits each and every allegation contained in Paragraphs, I, II, III, IV, V, VI, VII, and VIII of the Complaint herein. [13]

II.

Admits each and every allegation contained in Paragraph IX of the Complaint, and alleges that the policy issued by the Central Manufacturers' Mutual Insurance Company, No. F-321452, set forth in Paragraph IX of the Complaint contains, among other things, the following provision "other insurance permitted."

III.

Answering Paragraph X of the Complaint, defendant denies that by written endorsement dated October 7, 1946, the name of the insured in the policy issued by the Central Manufacturers' Mutual Insurance Company, No. F-321452, was changed to read, "Jim Dandy Markets, a corporation", and alleges that, on the 8th day of October, 1946, by written endorsement, this defendant, Jim Dandy

Markets, Inc. was recognized as the insured under said policy No. F-321452 issued by Central Manufacturers' Mutual Insurance Company in the place and stead of Charles Schuster, Leo A. Goldberg, Norman Schuster, Max M. Berick and Earl I. Swetow, doing business as Jim Dandy Markets.

IV.

Answering Paragraph XI of the Complaint, defendant admits each and every allegation contained therein, and alleges that the policy issued by the Indiana Lumbersmens Mutual Insurance Company No. 3170, set forth in Paragraph XI of the Complaint contains, among other things, the following provision "other insurance permitted."

V.

Answering Paragraph XII of the Complaint, defendant denies that by written endorsement dated July 19, 1946, the name of the insured in the policy No. 3170, issued by the Indiana Lumbersmens Mutual Insurance Company was changed to read "Jim [14] Dandy Markets, a Corporation," and alleges that, on the 7th day of October, 1946, by written endorsement, the name of the insured in said policy No. 3170, issued by the Indiana Lumbersmens Mutual Insurance Company was changed to read "Jim Dandy Markets, Inc."

VI.

Answering Paragraph XIII of the Complaint, defendant denies that, subsequent to the 19th day of July, 1946, the defendant, Fireman's Fund Insurance Company issued its standard California fire insurance policy No. A959495 whereby it insured

the defendant, E. F. Smith, as the named insured, against loss and damage by fire to the premises described in the Complaint herein in the amount of \$16,700.00, and denies each and every allegation contained in said Paragraph XIII of the Complaint, and in this connection defendant alleges that, on July 5, 1945, the defendant, Fireman's Fund Insurance Company, issued its standard California fire insurance policy No. A959495, whereby it insured the defendant, E. F. Smith, as the named insured, against loss and damage by fire to the premises described in the Complaint, and situated at 6801 Atlantic Boulevard, Bell, California, in the amount of \$16,700.00, and this defendant alleges that it does not know whether said policy No. A959495, issued by the defendant, Fireman's Fund Insurance Company, was in force and effect at the time of the loss and damage to the premises from fire on January 14, 1947.

VII.

Answering Paragraph XIV of the Complaint, defendant denies each and every allegation contained in said Paragraph XIV, and in this connection defendant alleges that said Policy No. A959495, issued by Fireman's Fund Insurance Company on July 5, 1945, provided, with reference to the apportionment of loss from fire, as follows: [15]

“Apportionment Clause: This company shall not be liable for a greater proportion of any loss from any peril or perils included in this endorsement than (1) the amount of insurance under this policy bears to the whole amount of fire insurance covering

the property, whether valid or not and whether collectible or not, and whether or not such other fire insurance covers against the additional peril or perils insured hereunder; (2) Nor for a greater proportion than the amount of insurance under this policy bears to the amount of all insurance, whether valid or not and whether collectible or not, covering in any manner such loss; furthermore, if there be insurance other than fire insurance covering any one or more of the perils causing loss hereunder, covering specifically any individual unit of property involved in the loss, only such proportion of the insurance under this policy shall apply to such unit specifically insured, as the value of such unit shall bear to the total value of all the property covered under this policy, whether such other insurance contains a similar clause or not.”

VIII.

Answering Paragraph XV of the Complaint, defendant does not have sufficient information or belief with respect to the allegations contained in said Paragraph XV, and because of such lack of information and belief, this defendant denies each and every allegation contained in said Paragraph XV, and in this connection defendant alleges that, at the time of the loss sustained by fire, as alleged in the Complaint and as hereafter alleged, there was fire insurance covering the property so destroyed by fire, as follows:

Central Manufacturers Mutual Insurance Company policy No. F321452, for \$12,500.00, in which this defendant is named as insured. [16]

Indiana Lumbermen's Mutual Insurance Company Policy No. 3170 for \$12,500.00, in which this defendant is named as the insured.

but this defendant does not know whether any policy issued by the defendant, Fireman's Fund Insurance Company, whether bearing No. A959495 or No. A94195, naming the defendant E. F. Smith as insured, was in force and effect at the time of the fire, and this defendant alleges that an actual and bona fide controversy exists and has arisen between all of the parties hereto respecting whether any policy of fire insurance issued by the defendant Fireman's Fund Insurance Company, was in force and effect at the time of the destruction of the insured property on January 14, 1947.

IX.

Admits the allegations contained in Paragraph XVI of the Complaint herein.

X.

Answering Paragraph XVII of the Complaint, this defendant admits that the defendant E. F. Smith is a party having an interest in, and directly affected by the controversies alleged in the Complaint, and hereinafter alleged, and that he is joined in this action because of his said interest in said controversies, but denies each and every allegation contained in Paragraph XVII of the Complaint and not expressly admitted herein.

XI.

Admits the allegations contained in Paragraph XIX of the Complaint herein.

XII.

This defendant alleges that, on January 14, 1947, the building and property insured and purported to be insured by the fire insurance policies issued by the plaintiffs herein, and by [17] the defendant Fire Insurance Company, was totally destroyed by fire. At the time of the fire the defendant, Jim Dandy Markets, Inc., was the owner of the building so destroyed by fire, and was in sole possession thereof.

XIII.

That immediately following the destruction of said building by fire, this defendant immediately, and without unnecessary delay, notified each of the plaintiffs of the total destruction of said building by fire; that thereafter the plaintiffs, and each of them, in writing, waived the provisions in each of said policies requiring this defendant to make formal written proof of loss; that on the 9th day of April, 1947, the plaintiffs herein and this defendant agreed, in writing, that the sound cash value of said insured property immediately preceding the loss, and the total loss and damage thereto was and is the sum of \$32,476.92.

XIV.

This defendant alleges that neither of the plaintiffs, or the defendant Fireman's Fund Insurance Company, have paid any moneys to this defendant on account of said loss.

XV.

That an actual controversy has arisen between the plaintiffs and the defendants as to whether the

defendant Jim Dandy Markets, Inc. had an insurable interest in the property described in plaintiffs' policies at the time of the fire, and whether the defendant E. F. Smith had an insurable interest in said property at the time of the fire; that an actual controversy has arisen as to whether the plaintiffs are liable for the full principal sum of their respective policies, to-wit: \$12,500.00 each by reason of the agreed loss of \$32,476.92, or whether the liability of said plaintiff is respectively limited to the [18] proportion of the loss that the amount respectively insured by the plaintiff bears to the sum of \$41,700.00; that an actual controversy has arisen as to whether the plaintiffs and the defendant Fireman's Fund Insurance Company are liable and responsible to this defendant for this defendant's loss by reason of the fire in the amount of \$32,476.92, and how much of said sum the plaintiffs and said defendant, Fireman's Fund Insurance Company, should pay towards said sum of \$32,476.92.

Wherefore, this answering defendant prays that this Court make an order and judgment decreeing and determining the respective rights of the parties hereto with respect to the controversies set forth in the Complaint herein, and set forth in this answer; and such other controversies that might exist between the parties hereto with respect to the policies issued by the plaintiffs herein and by the defendant, Fireman's Fund Insurance Company; and that the defendant have judgment for such

other and further relief as to this Honorable Court may seem just and equitable; and for costs of suit herein.

/s/ HARRY G. SADICOFF,
Attorney for Defendant, Jim Dandy Markets, Inc.
(Verified.)

[Endorsed]: Filed May 29, 1947. [19]

[Title of District Court and Cause.]

ANSWER OF E. F. SMITH

Comes now defendant E. F. Smith for answer to plaintiff's complaint says:

I.

As to the allegations of paragraph IX of plaintiff's complaint, defendant E. F. Smith is without knowledge or information and alleges that any insurance placed on the building as therein alleged was without the knowledge of said defendant E. F. Smith and not required by or in accordance with any contract or agreement with said defendant E. F. Smith, the owner of said building. [21]

II.

As to the allegations of paragraph XI of plaintiff's complaint, defendant E. F. Smith is without knowledge or information and alleges that any insurance placed on the building as therein alleged was without the knowledge of said defendant E. F. Smith and not required by or in accordance with any contract or agreement with said defendant E. F. Smith, the owner of said building.

III.

As to the allegations of paragraph XIII of plaintiff's complaint, defendant E. F. Smith denies that defendant Fireman's Fund Insurance Company issued its standard California fire insurance policy No. A-959495 subsequent to July 19, 1946 and alleges that said policy of insurance was issued to defendant E. F. Smith on July 5, 1945.

IV.

As to the allegations contained in paragraph XV of plaintiff's complaint, defendant E. F. Smith is without knowledge or information as to the policies of fire insurance on said building issued by Central Manufacturer's Mutual Insurance Company or as to the one issued by Indiana Lumbermen's Mutual Insurance Company but alleges that neither of said policies was issued to defendant E. F. Smith or for his benefit and neither constitutes an insurance of the building owned by defendant E. F. Smith in such manner as to cause any proration of the loss sustained by defendant E. F. Smith.

V.

Defendant E. F. Smith alleges that he was the sole owner of the building located at 6801 Atlantic Boulevard, Bell, California, on July 5, 1945 when the building was insured by Fireman's Fund Insurance Company by its policy No. A-959495 for the sum of \$16,700.00 and continued to be until, and was the sole owner thereof when, the building was totally destroyed by fire on the 14th day of January, 1947 to a total loss in excess of \$32,000.00. Defendant E. F. Smith [22] further alleges that the only

outstanding interest in said building was the right of occupancy under a sublease to defendant Jim Dandy Markets and that said sublease did not transfer to sublessee any of the insurable interest of defendant E. F. Smith as insured in said Fireman's Fund Insurance policy which was in full force and effect at the time of the fire on January 14, 1947.

VI

On the 29th day of September, 1941 defendant E. F. Smith as lessee entered into a lease with Chas. E. Kindig and Daisy Kindig as lessors, whereby said defendant E. F. Smith leased that real property situated in the City of Bell, County of Los Angeles, State of California and being a part of Lots 4 and 6, Block F of the Grider and Hamilton Subdivision of the east portion of said Bell tract, for a term of five years beginning on the first day of August, 1942, and until the first day of August, 1947. Thereafter and on the first day of February, 1942 said defendant E. F. Smith entered into another lease covering the same property for the same period of time with Thomas A. McLenaghan as administrator of the estate of E. T. Williams, deceased, the owner of a part interest in said property.

VII.

Defendant E. F. Smith, at the time of the execution of said leases, operated a food market on the property covered thereby which market was housed in a building built and owned by defendant E. F. Smith and it was provided in each of said leases that the improvements then on the premises and

all other improvements placed on the property during the terms of the lease are the property of and belong to defendant E. F. Smith and might be removed by defendant E. F. Smith at the expiration of the said leases. The business conducted on said real property was known as the "Atlantic Store" or the "Atlantic Boulevard Market" and will hereinafter be referred to as such. [23]

VIII.

On and after September 29, 1941, defendant E. F. Smith as owner of the building and as lessee of the real property was in possession of the Atlantic Store by himself, his agent or sublessee at all times up to and including the 14th day of January, 1947, on which date the leases and each of them were still in force and effect and defendant E. F. Smith, the lessee thereunder and the owner of the building on said property.

IX.

Defendant E. F. Smith, at the time of entering into said leases, was the operator of several stores in Southern California including said "Atlantic Store." Therefore and on the first day of July, 1945 defendant E. F. Smith as party of the first part entered into an agreement with Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership doing business under the name and style of Jim Dandy Markets as parties of the second part as to the eight stores, including the Atlantic Store, operated by defendant E. F. Smith, for the sale and purchase of the salable merchandise in each; the

leasing of all store fixtures and equipment; the leasing or subleasing of the stores; and the sale and purchase of specified trucks and trailers. A copy of said agreement is hereunto attached and marked Exhibit "A". Said co-partnership was subsequently incorporated and succeeded by the defendant Jim Dandy Markets Incorporated and will hereafter be referred to as Jim Dandy Markets.

X.

The agreement of July 1, 1945, Exhibit "A", provided that the Atlantic Store was subleased to Jim Dandy Markets and in accordance therewith Jim Dandy Markets entered into possession thereof as sublessee of defendant E. F. Smith and continued to occupy said property as sublessee until and subsequent to the 14th day of January, 1947. [24]

XI.

After the execution of the agreement of July 1, 1945, Exhibit "A", that is on July 5, 1945, defendant E. F. Smith purchased and defendant Fireman's Fund Insurance Company issued its policy of fire insurance No. A-959495 to said E. F. Smith for the total sum of \$166,000.00 on buildings used for retail food markets at various locations, including the building used by the Atlantic Store, on which building the insurance was stated to be \$16,700.00, which policy was at the time of the fire on January 14, 1947, and for all matters pertinent to this suit is still in force and effect.

XII.

On the 12th day of June, 1946, defendant E. F. Smith and defendant Jim Dandy Markets entered

into a supplementary and modified agreement modifying the terms of the agreement of July 1, 1945, Exhibit "A", and providing for the sale of "all of the fixtures, machinery and equipment located and contained in all of the markets referred to in the agreement hereinabove mentioned for a total consideration of \$225,000.00". The supplementary and modified agreement of June 12, 1946 further provided for the deposit in escrow of bills of sale of the fixtures, machinery and equipment located in the various markets; for the deposit in said escrow of the leases on named markets, including the Atlantic Boulevard Market, together with a written assignment of each of said leases; for the holding of said documents in said escrow until the full purchase price of the respective stores had been paid into said escrow after which the bill of sale together with the lease and assignment thereof of the respective markets was to be delivered to said Jim Dandy Markets; for the cancellation as of the 1st day of July, 1946 of the lease on said fixtures, machinery and equipment; for the cancellation and termination of the subleases of the various markets, including the Atlantic Store, as of the date of delivery from escrow of the [25] leases and assignments thereof. Copy of said supplementary and modified agreement of June 12, 1946 is hereunto attached and marked Exhibit "B".

XIII.

The supplementary and modified agreement of June 12, 1946, Exhibit "B", provided that the bill of sale, as well as the lease and assignment thereof,

of the Atlantic Boulevard Market could be obtained by defendant Jim Dandy Markets on payment of a total of \$27,300.00 into said escrow. Such total sum had not been paid into the escrow on or before January 14, 1947 and the bill of sale of the fixtures, machinery and equipment in said market or the lease and assignment of lease of the real property on which it was situated had not been delivered to Jim Dandy Markets on January 14, 1947 and on that date the sublease as provided in the agreement of July 1, 1945, Exhibit "A", was still in force and effect and the Jim Dandy Markets in possession of said market only as lessee under said sublease.

XIV.

At all times on and prior to the 14th day of January, 1947, defendant E. F. Smith was the owner of the building occupied by and in which the Atlantic Store was operated and at no time was the sale of said building considered or negotiated between said E. F. Smith and Jim Dandy Markets or any of the partners or agents thereof and at no time did the value of said building or the transfer of the ownership thereof enter into or become an item in the price fixed and established for the sale of the fixtures, machinery and equipment in said market by defendant E. F. Smith to said Jim Dandy Markets as set out in the supplementary and modified agreement of June 12, 1946 or at any other time and at no time did said Jim Dandy Markets or any one on its behalf acquire any title or interest in and to said building other than that of sub-

lessee for the purpose of occupying the same for the operation of the Atlantic Store. [26]

Wherefore, defendant E. F. Smith prays judgment as follows:

1. For a declaration that defendant E. F. Smith was the owner of the building at 6801 Atlantic Boulevard in the City of Bell, California on January 14, 1947 and at all times prior to its destruction by fire on that day, and

2. For a declaration that the ownership of said building by said defendant E. F. Smith constituted an insurable interest therein which was insured against fire by defendant Fireman's Fund Insurance Company, and

3. For a declaration that any leasehold interest, right of occupancy or expectancy arising from a contract of sale of the Atlantic Market in said city, all as claimed by defendant Jim Dandy Market or any persons for it, did not constitute any ownership or insurable interest in said building which detracted from or reduced the insurable interest of said defendant E. F. Smith and that any policy of fire insurance issued by plaintiffs or either of them to said defendant Jim Dandy Market in nowise detracted from or caused proration of liability due to said E. F. Smith from defendant Fireman's Fund Insurance Company on account of the insurance covering said building as owned by said E. F. Smith, and

4. For such other and further relief as to this

honorable court shall seem just and equitable and for all costs of suit herein.

Dated this 8th day of July, 1947.

/s/ CLYDE THOMAS and
/s/ MILAN MEDIGOVICH,

Attorneys for Defendant E. F. Smith. [27]

EXHIBIT "A"

[Plaintiff's Exhibit No. 13 at Trial]

AGREEMENT

This agreement, made and entered into this 1st day of July, 1945 by and between E. F. Smith, party of the first part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership, doing business under the name and style of Jim Dandy Markets, parties of the second part:

Witnesseth

Whereas the party of the first part is now engaged in the retail grocery, meat, liquor, delicatessen, fruit and vegetable business and is conducting eight (8) of said retail stores in the State of California, seven (7) of which are in the County of Los Angeles, and one (1) in the County of San Bernardino; and

Whereas of the eight stores so conducted by said party of the first part, four (4) of said stores are owned outright by said party of the first part, and four (4) of said stores are operated by virtue of leases wherein said party of the first part is the lessee; and

EXHIBIT "A"—(Continued)

Whereas the parties of the second part are desirous of purchasing the entire retail business of the party of the first part, including all salable merchandise and stock in trade, and henceforth said business of the party of the first part may be conducted under the name of E. F. Smith Public Markets, or under their own trade name; and

Whereas the party of the first part is the owner of all store fixtures and other equipment, including office equipment, in all of said eight (8) stores, which the parties of the second part are desirous of leasing from the party of the first part for a period of ten years; and [28]

Whereas the store buildings owned by said party of the first part are generally known as Central Avenue Store, Figueroa Street Store, Norwalk Store and Western Avenue Store, which store buildings parties of the second part are desirous of leasing for a period of ten (10) years from July 1, 1945, and the party of the first part will lease said four (4) store buildings for said period; and

Whereas the other four (4) stores referred to herein as stores leased by the party of the first part and which the parties of the second part are desirous of sub-leasing, are generally known as Watts Store, Atlantic Store, Ontario Store and Sixth Street Store, it being understood that all of said leases do not run for the full period of ten (10) years, but said parties of the second part will sub-lease same from said party of the first part during

EXHIBIT "A"—(Continued)

the balance of the term set forth in said leases, including the term referred to in the options in said leases; and

Whereas party of the first part has a lease for parking automobiles adjacent to the Figueroa Street store, which will expire May 31, 1947 on which the last month's rent has been paid in advance, and the parties of the second part are desirous of obtaining said parking lot lease by assignment, and the party of the first part will assign same, as hereinafter stated; and

Whereas the party of the first part is the owner of certain licenses required by the State of California, or other political sub-divisions of the State of California, required by party of the first part in conducting a portion of his retail business, and is desirous of transferring said licenses to the parties of the second part and the parties of the second part are desirous of having said licenses transferred upon the terms and conditions hereinafter set forth; and [29]

Whereas the party of the first part is now the owner of seven (7) trucks and four (4) trailers, hereinafter specifically described, which the parties of the second part are desirous of purchasing; and

Whereas the parties of the second part, as additional consideration and as a security for the faithful performance of the terms, conditions and obligations under this agreement and the payment of rent on the leases herein referred to, shall make an advance payment to the party of the first part of

EXHIBIT "A"—(Continued)

Fifty Thousand Dollars (\$50,000.00) as evidence of good faith that all of the terms, conditions and obligations herein referred to shall be fully and faithfully performed; and

Whereas the parties of the second part are desirous of securing an option for the purchase of all fixtures and equipment in said markets at the expiration of ten (10) years period herein referred to and the party of the first part is desirous of granting or giving said option to the parties of the second part; and

Whereas upon the completion of this agreement, the party of the first part is desirous of selling the good will of the market business to the parties of the second part, and the parties of the second part are desirous of acquiring the same;

Now, therefore, it is mutually agreed as follows:

1. That the party of the first part agrees to sell, and the parties of the second part agree to purchase, all salable merchandise now owned by party of the first part in all of said eight (8) stores hereinbefore referred to, and to pay cash for same in escrow; said escrow to be opened immediately upon the execution of this agreement with Naas-Baruch Company, and the inventory of said merchandise shall be taken under the [30] supervision of the parties hereto by the employees of first and second parties, or by some other person or persons to be agreed upon by the parties hereto. Said parties of the second part shall pay into escrow the full purchase price of said inventory, and said price shall

EXHIBIT "A"—(Continued)

be fixed at market or cost price, whichever is the lowest. Upon completion of said inventory and the payment of the inventory price thereof, said parties of the second part shall henceforth conduct the business of the party of the first part, either under the name of E. F. Smith Public Markets, or under the trade name of the parties of the second part, which permission to conduct said business under the name of E. F. Smith Public Markets is hereby given for the period of ten (10) years from the 1st day of July, 1945.

2. The party of the first part shall under the rules of the Office of Price Administration transfer to the parties of the second part all ration points in his possession or to his credit in the ration bank, said ration points so transferred, together with rationed merchandise inventory, shall be subject to the approval of the Office of Price Administration.

3. That the party of the first part does hereby lease to the parties of the second part all store fixtures and equipment, including office fixtures, now owned by the party of the first part and used in the conduct of his business, for a period of ten (10) years for a monthly rental of One Thousand Four Hundred Dollars (\$1400.00). An inventory of said fixtures and equipment shall be furnished by the party of the first part to the parties of the second part, showing the fixtures and equipment in each of the said stores above referred to, and said inventory shall be considered a part of this agreement. The title to all of said fixtures and equip-

EXHIBIT "A"—(Continued)

ment shall remain in the party of the first part during the entire term, but the parties of the second part [31] shall have the right and privilege, which right and privilege is hereby granted, to exchange or remove any of said equipment or fixtures by replacing same with other equipment or fixtures of at least equal market value—all of said replacements to become the property of the party of the first part.

4. The party of the first part does hereby agree with the parties of the second part to enter into a ten-year lease from July 1, 1945 for all store buildings owned outright by party of the first part, and the parties of the second part agree to lease said store buildings for the period of ten (10) years, at the following rentals:

Central Avenue Store.....\$550.00 per month

Figueroa Street Store..... 400.00 per month

Norwalk Store..... 200.00 per month

Western Avenue Store..... 650.00 per month

This said monthly rental does not include the rental of store fixtures and equipment hereinbefore set forth, but is subject to certain concessions or leases, as follows:

Central Avenue Store is subject to a written lease or concession for the sale of fruit and vegetables, at a rental of \$100.00 per month, which lease shall expire March 1, 1946, and which shall be assigned to the parties of the second part;

Figueroa Street Store is subject to a month to month lease for the sale of fruit and vegetables at

EXHIBIT "A"—(Continued)

the rental of \$100.00 per month, together with a written lease for the sale of merchandise usually found in drug stores at the rental of \$150.00 per month, which expires on December 2, 1948, and which shall be assigned to the parties of the second part;

Norwalk Store is subject to a month to month lease [32] for the sale of fruit and vegetables at the rental of \$130.00 per month;

Western Avenue Store is subject to a written lease for the sale of fruit and vegetables at the rental of \$300.00 per month, which expires March 1, 1946 and which shall be assigned to the parties of the second part.

Said fruit and vegetable leases include janitor, water, light and refrigeration services.

5. The party of the first part hereby agrees to sublease the stores now leased by party of the first part, known as the Watts, Atlantic, Ontario and Sixth Street Stores, to the parties of the second part, and the parties of the second part agree with the party of the first part to rent all of said stores for the full term of ten (10) years, provided, however, that on the expiration of the lease now upon said premises, the party of the first part will be able to re-lease said stores at a rental equal to or lower than that paid by the parties of the second part at the expiration of said leases, the parties of the second part must accept same; but in the event that the party of the first part is unable to re-lease said stores at the rent then paid by parties

EXHIBIT "A"—(Continued)

of the second part, party of the first part shall not release said stores at a higher rent unless same is satisfactory to parties of the second part, and parties of the second part will in that event pay the increased rent agreed upon on the first day of each and every month during the term of said leases or any extensions thereof, not to exceed ten (10) years.

The stores to be sub-leased to the parties of the second part are subject to the following sub-leases on concessions in said stores, which shall be assigned to the parties of the [33] second part;

Watts Store is subject to a written fruit and vegetable lease, which expires March 1, 1946, payable at the rate of \$300.00 per month;

Atlantic Store is subject to a written fruit and vegetable lease which expires March 1, 1946, payable at the rate of \$300.00 per month;

Ontario Store is subject to a month to month fruit and vegetable lease at \$300.00 per month;

Sixth Street Store is subject to a written fruit and vegetable lease which expires March 1, 1946 payable at the rate of \$300.00 per month; also subject to a written lease to Van de Kamp's Holland Dutch Bakeries, Inc., which expires May 31, 1948, payable at the rate of \$100.00 per month.

All fruit and vegetable sub-leases include janitor, water, light and refrigeration services.

6. It is understood by and between the parties hereto that the leases now held by the party of the first part have an expiration date prior to June 30, 1955 and that the party of the first part will do

EXHIBIT "A"—(Continued)

everything within his power to secure an additional lease to and including June 30, 1955 in the manner set forth in Paragraph 5. Said party of the first part must sub-lease to the parties of the second part all additional leases or extensions of the present leases covering the above stores at the exact rental that he is obligated to pay for said additional leases or extensions of leases on the above stores, and in the event said leases, or any of them, cannot be secured under terms satisfactory to the parties of the second part, the monthly rental on each [34] store shall be reduced proportionately together with the monthly rental to be paid by parties of the second part on the fixtures and equipment as follows:

In the event that the Watts store cannot be re-leased, the total rent on said sub-leases shall be reduced by \$500.00 per month, and the total rent on the fixtures and equipment shall be reduced \$200.00 per month;

In the event the Atlantic Avenue store cannot be re-leased, the total rent on said sub-leases shall be reduced \$320.00 per month on the property and \$200.00 per month on the fixtures and equipment;

In the event the Ontario store cannot be re-leased, the total rent from the sub-leases shall be reduced by \$205.00 per month and the rent on the fixtures and equipment shall be reduced \$200.00 per month;

In the event the Sixth Street store cannot be re-leased the total rent on the sub-lease shall be re-

EXHIBIT "A"—(Continued)

duced \$800.00 per month and the rent on the fixtures and equipment \$150.00 per month.

7. In the event any of the leases cannot be extended or new leases secured, the party of the first part may sell all of the fixtures in any of said stores not re-leased, and the option price hereinafter referred to shall be reduced in proportion, said reduction to be mutually agreed upon.

8. It is understood between the parties hereto that in the event any or all of the leases herein referred to cannot be renewed or new leases secured by the party of the first part, the parties of the second part shall not renew or lease any of them in their own name or otherwise, during the term of this lease.

9. It is further understood by and between the parties hereto that there is a parking lot lease adjacent to the Figueroa [35] Street store, which will expire May 31, 1947 on which the last month's rent has been paid in advance, and which the party of the first part will assign to the parties of the second part, and the parties of the second part will accept said assignment and pay to the party of the first part the last month's rent advanced on said parking lot lease. All other parking lot agreements or leases are on a month to month basis.

10. The party of the first part hereby agrees with the parties of the second part that the party of the first part shall assign all licenses now in his name issued by the State of California or any political sub-division thereof, that can be assigned to

EXHIBIT "A"—(Continued)

the parties of the second part, and the parties of the second part shall pay the pro-rata share of unused portions of said licenses.

11. The party of the first part hereby agrees to sell and transfer to the parties of the second part, the seven (7) trucks and four (4) trailers, and the parties of the second part agree to accept such sale and transfer and to pay for the same the sum of Seven Thousand Five Hundred dollars (\$7500.00) cash upon the execution of said transfer. Said trucks and trailers are more particularly described as follows:

Ford 8, Body Type Van—Engine No. 18-4889392.

Dodge 6, Body Type, Exp—Engine No. T-120-2685.

Ford 8, Body Type, Tract—Engine No. 99T-52661.

Dodge 6, Type Tract—Engine No. 7-4342.

Dodge 6, Body Type Stake Truck—Engine No. T100-1004.

Dodge 6, Body Type 0942 Van—Engine No. T120-1052.

Dodge 6, Body Type Tractor—Engine No. T120-6897.

Trailer—Make Utl. Semi, Body Type Stake, Factory No. 10147.

Trailer—Utl. Semi. Body Type Stake—Factory No. 9174.

Trailer Utl. Body Type Stake, Factory No. 8463.

Trailmobile, Body Type Stake Tir—Factory No. Cal. 292.

EXHIBIT "A"—(Continued)

12. The parties of the second part shall deposit as advance payment on the obligations herein incurred by the parties of the second part and as security for the faithful performance [36] of the obligations herein set forth to be performed by the parties of the second part, the sum of Fifty Thousand Dollars (\$50,000.00); said sum of \$50,000.00 shall be applied by the party of the first part upon the rental obligations of the leases herein referred to, due under this agreement during the last year thereof, provided, the parties of the second part faithfully carry out all of the terms and conditions therein set forth, together with the payment of all rents that may become due under and by virtue of any lease. The party of the first part shall pay to the parties of the second part six percent (6%) interest on said \$50,000.00, said interest to be paid annually.

13. The party of the first part does hereby give and grant to the parties of the second part an option to purchase all fixtures and equipment in all of said stores herein described at the price of One Hundred Ninety-two thousand five hundred dollars (\$192,500.00) cash; said option cannot be exercised until the expiration of said ten years, and if the parties of the second part desire to exercise said option at said time, a notice in writing to the party of the first part must be given at least ninety (90) days prior to the expiration of the said term of ten years, and the money to be paid on said option must be deposited in escrow to the credit of the

EXHIBIT "A"—(Continued)

party of the first part within 30 days after the issuance of said notice.

14. The parties of the second part shall not assign any of the leases or sub-leases herein referred to during the term of this agreement without the written consent of the party of the first part.

15. The party of the first part does hereby agree to furnish to the parties of the second part any records that he may have in reference to the purchase of merchandise or other records that may assist the parties of the second part in the conduct of the business herein sold, and in consideration of the execution [37] of this agreement by the parties of the second part and in consideration of the purchase by parties of the second part of the good will of the business operated by the party of the first part, and so long as the said parties of the second part fully and faithfully comply with all of the terms, provisions and conditions of this agreement, the party of the first part agrees that he will not engage in the retail market business, or any similar business as the one herein sold to the parties of the second part, within the County of Los Angeles or in the City of Ontario, California, as long as the parties of the second part or any person or persons deriving title to the good will of said business from said parties of the second part carries on a like business therein during the term of this contract.

16. The party of the first part is to pay all taxes levied or assessed against all fixtures in said stores

EXHIBIT "A"—(Continued)

and to keep same insured at his own cost and expense during the term of this agreement.

In witness whereof, the parties hereto have subscribed their names the day and year in this agreement first above written.

E. F. SMITH,

Party of the first part.

CHARLES SCHUSTER,

LEO A. GOLDBERG,

EARL I. SWETOW,

MAX M. BERICK,

NORMAN SCHUSTER,

Doing business under the name and style of Jim
Dandy Markets, Parties of the Second part. [38]

(Note: Exhibit "B" to this document being
"Supplementary and Modified Agreement" is the
same as Plaintiff's Exhibit 7 at the trial appearing
at page 65 of this printed Record.)

[Endorsed]: Filed July 9, 1947. [39]

[Title of District Court and Cause.]

CROSS-CLAIM OF DEFENDANT E. F. SMITH
AGAINST DEFENDANT JIM DANDY
MARKETS, INCORPORATED

For a separate cross-claim against defendant Jim Dandy Markets, Incorporated defendant E. F. Smith alleges:

I.

Cross-Claimant E. F. Smith hereby refers to the allegations contained in Paragraph V to XIV, inclusive, of his answer and hereby incorporates the same by reference and makes the same a part hereof for all purposes.

II.

Pursuant to the "supplementary and modified agreement," Exhibit "B", of the answer of Cross-Claimant E. F. Smith, an [40] assignment of the leases held by him on the real property on which the Atlantic store was situated was prepared, signed and deposited in escrow pursuant to said agreement. Copy of said assignment is hereunto attached marked Exhibit "C", hereby referred to and made a part hereof. Said assignment was executed only for the purpose of fulfilling the terms of the "supplementary and modified agreement" Exhibit "B" and not as a result of any further, additional or different consideration, negotiation or contract or pursuant to any agreement other than that contained in said "supplementary and modified agreement" Exhibit "B".

III.

The building occupied by said Atlantic Markets belonged to defendant and Cross-Claimant E. F. Smith as alleged in Paragraph VII of his answer and was not sold or otherwise conveyed or agreed to be conveyed to Jim Dandy Markets, or its predecessors in interest and no consideration was paid therefor under the terms of said "supplementary and modified agreement", Exhibit "B", or otherwise, or at all.

IV.

During the preparation for trial of the above entitled case and pre-trial negotiations in an effort to arrive at a stipulation of facts, it developed that Jim Dandy Markets claim that by virtue of said assignment Exhibit "C" the building occupied by said Atlantic Markets was conveyed to and is the property of said Jim Dandy Markets. At no time during the negotiations or discussions between defendant E. F. Smith and the defendant Jim Dandy Markets, its predecessors in interest or their brokers or agents, was the said building considered or discussed as a subject of the proposed sale by said E. F. Smith to Jim Dandy Markets, and its value was in no wise considered as an element of the sale price agreed upon and no part of said price was in payment of the value of said building. If said assignment Exhibit "C" is construed as conveying said building [41] it is contrary to the agreement of the parties as consummated in the "supplementary and modified agreement" Exhibit "B" and contrary to the understanding of all the parties

thereto. The assignment, Exhibit "C" was signed by defendant E. F. Smith under the belief that he was executing it only in fulfillment of the agreement Exhibit "B" and if said assignment Exhibit "C" is construed as conveying said building to said Jim Dandy Markets it does not correctly contain the agreement of the parties thereto; and Cross-Claimant E. F. Smith alleges that if said defendant Jim Dandy Markets and its predecessors did not share the belief of defendant E. F. Smith that said assignment did not convey said building, then said Jim Dandy Markets and its predecessors knew of the belief of defendant E. F. Smith in that regard and that he would not have signed said assignment as reduced to writing if he had known it did convey said building contrary to said agreement and understanding that the parties had entered into; if defendant Jim Dandy Markets and its predecessors did not share defendant E. F. Smith's belief that the assignment was only in accordance with said agreement Exhibit "B" then the conduct of the Jim Dandy Markets and its predecessors in failing to advise said defendant E. F. Smith that said assignment would convey said building was wrongful and fraudulent.

Wherefore, Defendant E. F. Smith prays judgment that said assignment Exhibit "C" be reformed to express the true intent of the parties as stated aforesaid, that is, as assigning the ground lease only and reserving the building thereon in the de-

fendant E. F. Smith; for cost of suit; and for such other and further relief as to the court may seem proper.

/s/ CLYDE THOMAS,
/s/ MILAN MEDIGOVICH,
Attorneys for Defendant
E. F. Smith. [42]

(Note: Exhibit "C" to this document entitled "Assignment of Lease" is omitted as it is the same as plaintiff's Exhibit No. 10 appearing at page 86 of this printed Record.)

[Endorsed]: Filed Oct. 24, 1947. [43]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, JIM DANDY
MARKETS, INC. TO CROSS CLAIM OF
DEFENDANT E. F. SMITH

Comes now the defendant, Jim Dandy Markets, Inc., and answering the cross-claim of the defendant, E. F. Smith, herein, admits, denies and alleges:

I.

With reference to Paragraph V of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, admits that the building upon the property at 6801 Atlantic Boulevard, Bell, California, at the time it was totally destroyed by fire on the 14th day of January, 1947, was reasonably worth in excess of \$32,000.00, but [44] denies each and every other matter, allegation and thing contained in said

paragraph, and not expressly admitted herein, and this defendant alleges that at the time said building was destroyed by fire, this defendant was the sole and unconditional owner of said building.

II.

With reference to Paragraph VI of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, admits the allegations contained in said Paragraph VI; that a photostatic copy of the Lease dated the 29th day of September, 1941, between the defendant E. F. Smith, as Lessee, and Charles E. Kindig and Daisy Kindig as Lessors, is attached hereto and made a part hereof, and is marked Exhibit "A"; that a photostatic copy of the Lease dated the 1st day of February, 1942, between the defendant E. F. Smith and Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, deceased, is attached hereto marked Exhibit "B".

III.

With reference to Paragraph VII of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant admits each and all of the allegations contained in said Paragraph VII.

IV.

With reference to Paragraph VIII of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant admits that said Leases (Exhibits "A" and "B") were in force and effect on

the 14th day of January, 1947, but denies each and every other allegation, matter and thing contained in said Paragraph VIII and not expressly admitted herein. [45]

V.

With reference to Paragraph IX of the Answer of the Defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant denies that, subsequent to the 1st day of July, 1945, or at any time, the partnership known as Jim Dandy Markets, and consisting of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, was incorporated under the name of Jim Dandy Markets, Inc. or Jim Dandy Markets, Incorporated, but admits each and all of the allegations contained in said Paragraph IX and not denied herein, and alleges that, subsequent to the 1st day of July, 1945, and prior to the 14th day of January, 1947, the defendant Jim Dandy Markets, Inc., a California Corporation, was organized and incorporated.

VI.

With reference to Paragraph X of the Answer of the Defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant admits that, on or about the 1st day of July, 1945, Jim Dandy Markets, a partnership, entered into possession of said "Atlantic Store" as the Sub-Lessee of the defendant E. F. Smith, but denies each and every other matter, allegation and thing contained in said Paragraph X, and alleges that, at the time the building was totally

destroyed by fire on the 14th day of January, 1947, the defendant Jim Dandy Markets, Inc. was in possession of said "Atlantic Store" and the building thereon, and that the said defendant Jim Dandy Markets, Inc. was in possession of said building as the sole and unconditional owner thereof.

VII.

With reference to the allegations contained in Paragraph XI of the Answer of the defendant E. F. Smith, and [46] incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant has not sufficient information or belief with reference to the allegations contained in said Paragraph XI, and therefore denies each and every matter, allegation and thing contained in said Paragraph XI.

VIII.

With reference to Paragraph XII of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant admits that on the 12th day of June, 1946, the defendant E. F. Smith and the partnership known as Jim Dandy Markets, entered into a "Supplementary and Modified Agreement"; that a photostatic copy of said "Supplementary and Modified Agreement" is attached hereto and made a part hereof, and is marked Exhibit "C"; that subsequent to the 12th day of June, 1946, and prior to the time that the building was totally destroyed by fire on January 14, 1947, all rights with respect to said "Atlantic Store" were transferred, sold and assigned to the defendant Jim Dandy Markets, Inc.

This defendant denies each and all of the allegations contained in said Paragraph XII and not expressly admitted herein.

This defendant further alleges that, concurrently with the execution and delivery of said "Supplementary and Modified Agreement", and in accordance with the terms, covenants and conditions of said Agreement, an escrow was commenced with the Morrison Escrow Company, and Escrow Instructions and Modified Escrow Instructions were given to said Morrison Escrow Company; that a photostatic copy of said Escrow Instructions and said Modified Escrow Instructions is attached hereto and made a part hereof, and is marked Exhibit "D"; that at the time said Escrow Instructions and Modified Escrow Instructions (Exhibit "D") were delivered to the said Morrison Escrow Company, the defendant [47] E. F. Smith delivered to said Morrison Escrow Company, each and all of the documents required by him to be delivered under the terms, covenants and conditions of said "Supplementary and Modified Agreement" (Exhibit "C"), and of said Escrow Instructions and Modified Escrow Instructions (Exhibit "D"), including, but not limiting, the following documents, which documents all refer and relate to the said "Atlantic Store":

(a) Lease dated September 29, 1941, between E. F. Smith as Lessee, and Charles E. Kindig and Daisy Kindig as Lessors (Exhibit "A"):

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee, and Thomas A. McLenaghan as

Administrator of the Estate of E. T. Williams, deceased. (Exhibit "B").

(c) Bill of Sale dated June 27, 1946, executed by E. F. Smith in favor of Jim Dandy Markets, a partnership; that a photostatic copy of said Bill of Sale is attached hereto and made a part hereof, and marked Exhibit "E".

(d) Assignment of Lease dated June 27, 1946, executed by defendant E. F. Smith in favor of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster; that a photostatic copy of said Assignment of Lease is attached hereto and made a part hereof, and marked Exhibit "F". [48]

IX.

With reference to Paragraph XIII of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant denies that on January 14, 1947 (that date being the day upon which the building was destroyed by fire) the Agreement dated the 1st day of July, 1945 (and denominated in said paragraph as a "Sub-Lease" and called Exhibit A and affixed to the Answer of the defendant E. F. Smith) was in full force and effect, and denies that the defendant Jim Dandy Markets, Inc. was in possession of said "Atlantic Store" as a Lessee under said Agreement dated July 1, 1945, and admits each and every allegation, matter and thing contained in said Paragraph XIII and not expressly denied herein, and in this connection this defendant alleges that, prior to January 14, 1947, and subsequent to

the 12th day of June, 1946 (the date upon which the Supplementary and Modified Agreement was entered into), this defendant, Jim Dandy Markets, Inc., by mesne conveyance, succeeded to all rights that the partnership known as Jim Dandy Markets had under the following documents, as they relate to said "Atlantic Store":

(a) Lease dated September 29, 1941, between the defendant E. F. Smith, as Lessee, and Charles E. Kindig and Daisy Kindig as Lessors, (Exhibit "A").

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee, and Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, Deceased. (Exhibit "B")

(c) Supplementary and Modified Agreement dated June 12, 1946. (Exhibit "C") [49]

(d) Escrow Instructions and Modified Escrow Instructions. (Exhibit "D")

(e) Bill of Sale dated June 27, 1946. (Exhibit "E")

(f) Assignment of Lease dated June 27, 1946. (Exhibit "F").

And in this connection this defendant further alleges that, on the 5th day of October, 1946, the co-partnership theretofore existing between Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, and doing business under the fictitious firm name and style of Jim Dandy Markets, was dissolved, and said "Atlantic Store", including all merchandise, fixtures and rights of said partnership under the "Supplemen-

tary and Modified Agreement" (Exhibit "C"), and rights under the "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D"), and "Bill of Sale" (Exhibit "E") and "Assignment of Lease" (Exhibit "F") above set forth, as well as other stores, were, by said partnership and its partners, transferred to Charles Schuster and Norman Schuster, and said Charles Schuster and Norman Schuster, on the said 5th day of October, 1946, transferred all of said rights so acquired by them from the partnership, to the defendant Jim Dandy Markets, Inc., and Jim Dandy Markets, Inc., at all times from and after the said 5th day of October, 1946, was in possession of the said "Atlantic Store", including the building thereon, to and including January 14, 1947, at which time the building known as the "Atlantic Store" was totally destroyed by fire, and this defendant alleges that all payments required to be made under the provisions of the "Supplementary and Modified Agreement" (Exhibit "C"), and under the "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D"), up to and including the date the building was destroyed by fire, were made by either the partnership known as Jim Dandy Markets, or [50] the defendant Jim Dandy Markets, Inc., and the full amounts due under said "Supplementary and modified Agreement" (Exhibit "C"), and said "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D") on the "Atlantic Store" were fully and completely paid to the defendant E. F. Smith by the defendant Jim Dandy Markets, Inc. on or

about the 19th day of March, 1947, and all amounts due under said "Supplementary and Modified Agreement" (Exhibit "C"), and said "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D") have been paid and were received by the defendant E. F. Smith subsequent to the 14th day of January, 1947, and no amount is due, owing and unpaid to the defendant E. F. Smith under said "Supplementary and Modified Agreement" (Exhibit "C"), and said "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D"); that at the time of the destruction of the building by fire on January 14, 1947, neither the partnership known as Jim Dandy Markets, nor the defendant Jim Dandy Markets, Inc. were in default in the payment of any amounts due and payable under the "Supplementary and Modified Agreement" (Exhibit "C"), and said "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D").

This defendant further alleges with reference to the allegations contained in Paragraph XIII of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, that the building which was destroyed by fire, and known as the "Atlantic Store" was built partially upon the land described in the Lease marked Exhibit "A" and partially upon the land described in the Lease marked Exhibit "B"; that at no time from the 1st day of July, 1945 to the date that the building known as the "Atlantic Store" was destroyed by fire, or at any time subsequent thereto, did the defendant E. F.

Smith ask, demand or receive any rents for the use or occupancy of said building, or the land upon which said building was situated, and [51] all rents and taxes, including the taxes upon the building, which were due and payable as provided in the Leases marked Exhibit "A" and Exhibit "B" were paid by Jim Dandy Markets, partnership, or Jim Dandy Markets, Inc., to the respective Lessors named in said Leases; that within a few days after payment was received by the defendant E. F. Smith of all amounts due him for the "Atlantic Store" under the provisions of the "Supplementary and Modified Agreement" (Exhibit "C") and said "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D"), the said Morrison Escrow Company delivered to the defendant Jim Dandy Markets, Inc., the following documents.

(1) Lease marked Exhibit "A".

(2) Lease marked Exhibit "B".

(3) Bill of Sale marked Exhibit "E".

(4) Assignment of Lease marked Exhibit "F".

and delivered to the defendant Jim Dandy Markets, Inc., all documents required by said "Supplementary and Modified Agreement" (Exhibit "C") and said "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D") to be delivered by said Morrison Escrow Company to Jim Dandy Markets, or its successors or assigns, upon the payment in full to the defendant E. F. Smith of the sum of \$27,300.00 for said "Atlantic Store".

This defendant further alleges that on the 30th day of July, 1947, the full sum of \$225,000.00 re-

quired to be paid to the defendant E. F. Smith under the "Supplementary and Modified Agreement" (Exhibit "C"), and the "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D"), was paid to the defendant E. F. Smith, and the Morrison Escrow Company delivered to the defendant Jim Dandy Markets, Inc., all papers and documents required of said Morrison Escrow Company under said "Supplementary and Modified Agreement" (Exhibit "C"), and the "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D"), to be delivered. [52]

X.

Answering Paragraph II of the Cross-claim of the defendant E. F. Smith, this defendant admits that the defendant E. F. Smith, pursuant to the "Supplementary and Modified Agreement" (Exhibit "C") deposited with the Morrison Escrow Company the "Assignment of Lease" marked Exhibit "C" in the cross-claim of said defendant E. F. Smith, and marked Exhibit "F" herein, but denies each and every matter, allegation and thing contained in said Paragraph II and not expressly admitted herein.

XI.

This defendant denies each and every matter, allegation and thing contained in Paragraph III of the cross-claim of the defendant E. F. Smith herein.

XII.

This defendant denies each and every matter, allegation and thing contained in Paragraph IV of the cross-claim of the defendant E. F. Smith herein.

For a Further and Separate Defense to Said Cross-Claim This Defendant Alleges:

I.

That the defendant E. F. Smith is a resident of the County of Los Angeles, State of California; that the defendant Jim Dandy Markets, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California; that its principal place of business is in the County of Los Angeles; that the defendant Fireman's Fund Insurance Company is a corporation organized and existing under and by virtue of the laws of the State of California; that its principal place of business is in the City and County of San Francisco.

II.

That said cross-claim fails to state a claim against [53] this defendant upon which the relief prayed for can be granted, in that it appears from the cross-claim of the defendant E. F. Smith that neither the plaintiffs herein, nor Fireman's Fund Insurance Company are parties to, or interested in the alleged cause of action of the defendant E. F. Smith on his alleged cross-claim, and that a determination of the controversy alleged in said cross-claim between this defendant and the said defendant E. F. Smith cannot be had in this Court for the reason that the said E. F. Smith and this defendant are each citizens and residents of the State of California, and no diversity of citizenship, or other jurisdictional grounds exist to give this Court jurisdiction to determine the controversy alleged in said cross-claim.

Wherefore, this defendant prays that the defendant E. F. Smith take nothing by his cross-claim herein; that the same be dismissed; and that this defendant have judgment for costs and for such other and further relief as is just and proper.

/s/ HARRY G. SADICOFF,
Attorney for Defendant, Jim Dandy
Markets, Inc. [54]

EXHIBIT "A"
[Plaintiff's Exhibit No. 5 at Trial]

LEASE

This Indenture, made this 29th day of September, 1941, between Chas. E. Kindig and Daisy Kindig, husband and wife, of Moorpark, California, party of the first part, hereinafter referred to and designated as the Lessor, and E. F. Smith, party of the second part, of Los Angeles, California, hereinafter referred to and designated as the Lessee:

Witnesseth

First: That the Lessor for and in consideration of the rents hereinafter reserved, and the covenants, promises and agreements herein contained and expressed, on the part of the Lessee to be kept, performed and fulfilled, does by these presents, demise, lease and let unto said Lessee all the following described property:

That certain real property situated in the City of Bell, County of Los Angeles, State of California and more specifically described as the Easterly 204.21 feet, measured from the present Westerly line of Atlantic Blvd., of Lots 4 and

Exhibit "A"—(Continued)

6, Block "F", of the Grider and Hamilton's Subdivision of the East Portion of Bell Tract, as per map recorded in Book 2, Page 94 of Maps, in the office of the County Recorder of Los Angeles County; with the appurtenances:

To Have and to Hold the above described premises with the rights, privileges, easements and appurtenances attaching to and belonging to said Lessor for the term of five (5) years, from the first day of August, 1942, for, during, until and including the first day of August, 1947, the said Lessee paying rent therefor as hereinafter provided.

Second: That said Lessee, in consideration of the leasing of the premises aforesaid, does hereby covenant and agree to and with the said Lessor to pay the rent, the sum of Eighty-two Hundred and Eighty (\$8280.00) Dollars, for the said term of five years in installments as follows:

The sum of One Hundred and Twenty-five (\$125.00) Dollars on the first day of each and every month for twelve months beginning August 1st, 1942; the sum of One Hundred and Thirty (\$130.00) Dollars on the first day of each and every month for twelve months beginning August 1st, 1943; the sum of One Hundred and Forty (\$140.00) Dollars on the first day of each and every month for twelve months, beginning August 1st, 1944; the sum of One Hundred and Forty-five (\$145.00) Dollars on the first day of each and every month for twelve months, beginning August 1st, 1945; and the sum of One Hundred and Fifty (\$150.00) Dollars on the first

Exhibit "A"—(Continued)

day of each and every month beginning August 1st, 1946, until the aggregate sum of Eighty-two Hundred and Eighty (\$8280.00) Dollars has been paid. Said monthly rental payable in advance on the first day of each and every month.

Third: The Lessee will also pay and discharge, in addition to the above stated rents, all water, electric, gas and other lighting, heating and power rents and charges for services used by [55] him on the said premises during the term of this lease.

Fourth: The Lessee will also pay and discharge all real estate taxes assessed by the City, County or State, for the land and improvements of the said demised premises during the term of this lease.

Fifth: It is understood that the improvements now on the premises are the property of the Lessee, and it is agreed by the Lessor that these and all other improvements placed on the said property during the term of this lease by the Lessee shall belong to the Lessee and may be removed by him at the expiration of the said term.

Sixth: It is further agreed that if any default shall be made by the Lessee in the payment of installments of rent or of taxes when due, and that said default shall continue for thirty days, the Lessor shall have the right to terminate this lease, and to enter upon said premises and take full possession thereof.

Seventh: It is also agreed that the Lessee shall have the option, and such option is hereby granted to him by said Lessor, of extending the within lease

Exhibit "A"—(Continued)

for an additional term of five years from August 1st, 1947, to August 1st, 1952, on the same terms and conditions as in this lease set forth, excepting that the installments of rent shall be payable as follows: \$150.00 per month for 12 months, beginning August 1st, 1947; \$170.00 per month for 12 months, beginning August 1st, 1948; \$175.00 per month for 12 months, beginning August 1st, 1949; \$185.00 per month for 12 months, beginning August 1st, 1950; and \$195.00 per month for 12 months, beginning August 1st, 1951, until the expiration of said extended term, being August 1st, 1952.

Eighth: The expressions, terms, conditions, requirements and obligations of this lease are binding upon and shall inure to the benefit of the parties hereto, their heirs and administrators and successors in interest, and shall be construed covenants running with the land.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

/s/ E. F. SMITH,
Lessee.

/s/ CHAS. E. KINDIG,
/s/ DAISY KINDIG,
Lessors.

Appendix: It is mutually agreed that the Lessee will give written notice to the Lessor of his inten-

Exhibit "A"—(Continued)

tion to exercise the within option on or before May 1, 1947.

/s/ E. F. SMITH,

Lessee.

/s/ CHAS. E. KINDIG,

/s/ DAISY KINDIG,

Lessors. [56]

EXHIBIT "B"

[Plaintiff's Exhibit No. 6 at Trial]

February 1, 1942.

E. F. Smith,
Los Angeles, California.

Dear Sir:

In consideration of your leasing the Easterly 204.21 feet of our Lot 2 Block F of the Grider & Hamilton's Subdivision of the East Portion of Bell Tract in the City of Bell, County of Los Angeles, State of California as per map recorded in Book 3 Page 36 of Maps, records of said county, as per lease dated February 1, 1942, we the undersigned hereby grant to you the following option:

The aforementioned lease grants to you the option to lease the said premises for an additional term of fifty-four months, i.e., from August 1, 1947, to February 1, 1952, and we, the undersigned, do hereby grant to you the option to lease the said premises for an additional term of six months, from February 1, 1952, to August 1, 1952, at the same rental and on the same terms as set forth in the

Exhibit "B"—(Continued)

option covering the term from August 1, 1947, to February 1, 1952.

In Witness Whereof we have hereunto set our hands the day and year first above written.

/s/ ETHYL WILLIAMS HARTLEY

/s/ SARAH MURIEL WELLINGS.

LEASE

This Indenture made this 1st day of February 1942 between Thomas A. McLenaghan, as Administrator of the estate of E. T. Williams, deceased, of San Pedro, California, hereinafter designated as the Lessor and E. F. Smith of Los Angeles, California, hereinafter designated as the Lessee:

Witnesseth: That the Lessor for and in consideration of the payment of the rents hereinafter reserved and the covenants, promises and agreements herein contained and expressed on the part of the Lessee to be kept performed and fulfilled, does by these presents demise, lease and let unto said Lessee, all of the following described property, to-wit:

That certain real property situated in the City of Bell, County of Los Angeles, State of California, and more particularly described as the Easterly 204.21 feet, measured from the present Westerly line of Atlantic Blvd., of Lot 2 of Block F of the Grider and Hamilton's Subdivision of the East Portion of Bell Tract, as per map recorded in Book 3 Page 36 of Maps in the office of the County Recorder of said county; with the appurtenances:

Exhibit "B"—(Continued)

To Have and to Hold the above premises with the rights, privileges, easements and appurtenances attaching to and belonging to said Lessor for the term of five years from the 1st day of August 1942 until and including the 1st day of August 1947, the Lessee paying rent therefor as hereinafter provided.

That the said Lessee in consideration of the leasing of the premises aforesaid, does hereby covenant and agree to and with the said Lessor, to pay the rent, the sum of Six Thousand Dollars (\$6000) for the said term of five years in installments, as follows: The sum of One Thousand Dollars (\$1000) which was paid to the Lessor by the Lessee on August 28, 1941 together with the sum of One Thousand Dollars (\$1000) paid upon the execution and delivery of this lease together with the interest on said sums, constitute the payment of the rental for the first Twenty-two and one-third months of this lease, to the 10th day of June, 1944 and the Lessor hereby acknowledges receipt of the said Twenty-two and one-third months rental equivalent to the sum of Two Thousand Two Hundred Thirty-three and 33/100 Dollars (\$2233.33). The Lessee agrees to pay the Three Thousand Seven Hundred Sixty-six and 67/100 Dollars (\$3766.67) balance of rental as follows: the sum of \$166.67 on the 1st day of July 1944 and the sum of \$100 on the 1st day of each and every month thereafter for 36 months, until the aggregate sum of rental of \$6000 has been paid.

The Lessee will also pay and discharge, in addition to the above rents, all water, electricity, gas,

Exhibit "B"—(Continued)

lighting, heating and power rents and charges for services used by said Lessee on said premises during the term of this lease.

The Lessee will also pay and discharge all real estate taxes assessed by the City, County or State for the land and improvements of said demised premises for the period covered by the term of this lease.

It is understood that the improvements now on the premises are the property of and belong to the Lessee and it is agreed by the Lessor that these and all other improvements placed on the said premises by the Lessee during the term of this lease or any extension of said lease, shall belong to the said Lessee and may be removed by him at the expiration of the term. [58]

It is further agreed that if any default shall be made by the Lessee in the payment of rent or of taxes, when due and said default shall continue for thirty days, after notice, the Lessor shall have the right to terminate this lease, and to enter upon said premises and take full possession thereof.

It is also agreed that the Lessee shall have the **option and such option** is hereby granted to him by said Lessor of extending the term of this lease for an additional term of four years and six months, from August 1, 1947 to February 1, 1952 on the same terms and conditions as in this lease set forth excepting that the installments of rental shall be payable as follows: The sum of \$125 payable monthly in advance on the 1st day of each and

Exhibit "B"—(Continued)

every month beginning August 1, 1947 for fifty-four months to February 1, 1952 until the aggregate sum of rent of Six Thousand Seven Hundred fifty Dollars (\$6750) has been paid.

The Lessee further agrees that in consideration of the leasing of the above described premises as aforesaid, that he will on and after February 1, 1942 release that portion of the said Lot 2 hereinabove described which is not included in this lease, from the lease which the Lessee now holds and which covers all of said Lot 2 and the Lessee agrees to surrender possession of said portion not included herein on or before February 1, 1942.

The expressions, terms, conditions and obligations of this lease are binding upon and shall inure to the benefit of the parties hereto, their heirs, administrators and successors in interest, and shall be construed covenants running with the land.

In Witness Whereof the parties hereto have hereunto set their hands the day and year first above written.

/s/ THOMAS A. McLENAGHAN,
Administrator of the estate of E. T. Williams, deceased.

/s/ E. F. SMITH

[59]

EXHIBIT "C"

[Plaintiff's Exhibit No. 7 at Trial]

SUPPLEMENTARY AND MODIFIED
AGREEMENT

This supplementary and modified agreement entered into this 12th day of June, 1946, by and between E. F. Smith, of the County of Los Angeles, State of California, hereinafter referred to as Party of the First Part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership, doing business under the firm name and style of Jim Dandy Markets, hereinafter referred to as Parties of the Second Part,

Witnesseth

Whereas the Party of the First Part and Parties of the Second Part did heretofore, to-wit: on the 1st day of July, 1945, make and enter into a written agreement pertaining to the sale and purchase of certain trucks, the sale and purchase of certain merchandise, the leasing and sub-leasing of certain markets as well as the leasing of certain fixtures, machinery and equipment located and contained in said market premises, to which agreement reference is hereby made for further particulars; and

Whereas the Parties thereto and hereto desire by their mutual consent, to amend said agreement in the respects hereinafter mentioned,

Now Therefore in consideration of the mutual covenants and agreements of the Parties it is understood and agreed as follows:

1. The Party of the First Part agrees to sell, and the Parties of the Second Part agree to pur-

Exhibit "C"—(Continued)

chase concurrently herewith, all of the fixtures, machinery and equipment located and contained in all of the markets referred to in the Agreement hereinabove mentioned, for a total consideration of Two Hundred Twenty Five Thousand Dollars (\$225,000.00); [60] under the terms of said prior Agreement the Parties of the Second Part deposited with the Party of the First Part the sum of Fifty Thousand Dollars (\$50,000.00) as security for the performance of the terms and conditions thereof, and with respect to said sum of money it is understood and agreed that Thirty Thousand Dollars (\$30,000.00) thereof shall be applied by the Party of the First Part on account of the purchase price mentioned herein; the balance of such purchase price in the sum of One Hundred Ninety Five Thousand Dollars (\$195,000.00) shall be paid, in escrow, to the Party of the First Part by the Parties of the Second Part at the rate of Five Thousand Dollars (\$5,000.00), or more, per month, commencing on the 1st day of August, 1946 and on the 1st day of each and every month thereafter until said balance is fully paid, together with interest thereon at the rate of six per cent. (6%) per annum, payable monthly with each principal payment.

2. With respect to the balance of the sum of Fifty Thousand Dollars (\$50,000.00) after applying the sum of Thirty Thousand Dollars (\$30,000.00) on account of the purchase price, as specified in the preceding paragraph, which said bal-

Exhibit "C"—(Continued)

ance represents the sum of Twenty Thousand Dollars (\$20,000.00), the same shall continue to be held and retained by the Party of the First Part as security for the faithful performance by the Parties of the Second Part of the terms covenants and conditions of that certain lease entered into by and between the Party of the First Part as Lessor and the Parties of the Second Part as Lessee, pertaining to the four (4) market locations owned by the Party of the First Part, and which are referred to as Central Avenue Market, Western Avenue Market, Figueroa Street Market and Norwalk Market; [61] if the Parties of the Second Part have faithfully complied with all the terms and conditions of the lease, the Party of the First Part will retain the said sum of Twenty Thousand Dollars (\$20,000.00), as aforesaid, and will give the Parties of the Second Part free rental during the last eleven (11) months of the lease on the Central Avenue Market, Western Avenue Market and Figueroa Street Market and twelve (12) months free rental on the Norwalk Market. On said sum of Twenty Thousand Dollars (\$20,000.00) the Party of the First Part agrees to pay to the Parties of the Second Part interest thereon at the rate of six per cent. (6%) per annum, commencing July 1, 1946 payable annually on the 1st day of July of each year commencing July 1, 1947 and continuing until the last year of the lease.

3. Concurrently with the execution hereof an escrow shall be opened wherein the Party of the First Part shall deposit a separate Bill of Sale to

Exhibit "C"—(Continued)

the fixtures, machinery and equipment, located in each of the several markets herein referred to, the same to be free and clear of all claims, liens or encumbrances; in addition thereto a separate Bill of Sale shall be deposited covering all items of office furniture, fixtures and equipment which are referred to in the prior Agreement hereinabove mentioned. Party of the First Part further agrees to deliver to and deposit in said escrow the original leases on the Ontario Market, Watts Market, Atlantic Boulevard Market and Sixth Street Market, together with a written assignment of each of said leases in favor of Parties of the Second Part, where such assignment is permitted in the lease, and where written consent to assign is required in the lease, he will deliver such assignment if permission can be secured; if permission to assign any of the leases cannot be obtained then the existing sub-lease on said market between the Parties hereto as Lessor and Lessee, respectively, shall remain in full force [62] and effect in accordance with the terms and provisions of the original Agreement except that the Parties of the Second Part, as Lessees, shall have the right to assign the same without procuring or obtaining the consent or permission of the Party of the First Part, when they have deposited in escrow the sum of money required in Paragraph 4.

The lease now in existence upon the aforesaid fixtures, machinery and equipment, heretofore entered into by and between the Party of the First Part as Lessor and the Parties of the Second Part

Exhibit "C"—(Continued)

as Lessee, shall be deemed, and is hereby, cancelled and terminated as of the 1st day of July, 1946, and all payments of rental thereon shall cease as of said date.

With reference to the leases and the written assignments thereof, to be deposited in escrow by the Party of the First Part, it is understood and agreed that the sub-leases pertaining to the same subject matter shall be deemed cancelled and terminated as of the date of delivery from escrow of the leases and assignments thereof, as set forth in Paragraph 4, and the Parties of the Second Part shall be released and discharged of and from any and all liability accruing thereunder from and after said date.

4. Notwithstanding anything to the contrary hereinafter contained in the within Paragraph, it is understood and agreed that when the Parties of the Second Part have caused to be deposited in escrow the total sum of One Hundred Ninety Five Thousand Dollars (\$195,000.00), their obligation under this agreement shall be deemed to have been fully paid and discharged, and all leases, sub-leases, assignments and Bills of Sale, remaining undelivered in escrow, shall be immediately delivered to the Parties of the Second Part without the payment of any further consideration. [63]

The escrow instructions to be executed by the parties hereto shall provide that in the event the Parties of the Second Part desire to obtain delivery from the escrow of any of the Bills of Sale, as well as the lease and the assignment thereof, pertaining

Exhibit "C"—(Continued)

to the market location where the fixtures described in the Bill of Sale are located, they shall have the right to demand such delivery at any time, upon the condition that the said Parties of the Second Part shall, concurrently with such demand, deposit in said escrow the sum of money shown opposite each market in the following schedule, after first deducting therefrom the percentage of the monthly payments made prior to the date upon which such demand is presented, such percentage appearing after each market, to-wit: [64]

Western Avenue	\$39,975.00	20½%
Ontario	28,275.00	14½%
Sixth Street	27,300.00	14%
Atlantic Blvd.	27,300.00	14%
Central Avenue	23,400.00	12%
Watts	19,500.00	10%
Figueroa Street	14,625.00	7½%
Norwalk	14,625.00	7½%

The Party of the First Part shall have the right to withdraw from escrow all funds deposited therein by the Parties of the Second Part, at any time after said funds are so deposited, subject only to the filing of any claims against him in said escrow and subject only to the deposit in said escrow of the Bills of Sale, the leases and the assignments thereof, as hereinbefore stated.

Notwithstanding anything to the contrary herein contained it is understood and agreed that the Parties of the Second Part shall not have the right

Exhibit "C"—(Continued)

to demand from the escrow a delivery of the Bill of Sale pertaining to the office furniture, fixtures and equipment until such time as the entire amount of the purchase price herein mentioned has been fully paid.

If any claims are presented in escrow against said Party of the First Part the same shall be paid by him before the close of said escrow.

5. As to any leases assigned by the Party of the First Part to the Parties of the Second Part, the said Parties of the Second Part do hereby agree to indemnify the said Party of the First Part and to hold him harmless of and from any and all liability which may or might accrue under such leases subsequent to the assignment thereof by him to the Parties of the Second Part.

6. As to those market sites owned by the Party of the First Part and which have been leased to the Parties of the Second Part, and which are referred to as Central Avenue Market, Western Avenue Market, Figueroa Street Market and [65] Norwalk Market, the said Party of the First Part agrees that the said Parties of the Second Part may, without obtaining the consent or permission of the Party of the First Part, sub-lease some or all of such market sites or assign the lease and/or leases pertaining to one or more of such market sites; the proposed assignee shall assume and agree to be bound by the terms and conditions of said lease and/or leases, in writing, and a copy of such assignment and assumption shall be delivered to the

Exhibit "C"—(Continued)

Party of the First Part, whereupon the Parties of the Second Part shall be released and discharged of and from any and all liability accruing under such lease and/or leases which may or might accrue subsequent to the date of such assignment.

In view of the fact that the lease on the four (4) market sites owned by the Party of the First Part is represented by one instrument, it is understood and agreed that said Party of the First Part will, upon request of the Parties of the Second Part, execute and deliver individual leases upon the several market sites in order to make convenient the sub-leasing of the premises involved or the assignment of said lease and/or leases; such individual leases shall be on the exact terms and conditions now contained in the one instrument except as to the payment of rental for fixtures, machinery and equipment, the deposit of the sum of Twenty Thousand Dollars (\$20,000.00) as security for the faithful performance of the terms, conditions and covenants of said lease and the giving to the Parties of the Second Part of free rental during the last eleven (11) months of the lease on the Central Avenue Market, Western Avenue Market, and Figueroa Street Market and twelve (12) months free rental on the Norwalk Market, and except as to any other matter contained therein which is inconsistent with the provisions of this agreement.

7. The Parties of the Second Part will, at their own expense, on and after the 1st day of July, 1946, keep said [66] fixtures, machinery and equipment

Exhibit "C"—(Continued)

fully insured with loss payable to the Party of the First Part, until the full purchase price has been paid; and will further, during said period, pay all personal property taxes levied or assessed against said fixtures, machinery and equipment.

8. The Party of the First Part shall have no further concern in connection with the renewal or extension of any of said sub-leases in which he is named as Lessee, and which are being assigned by him to the Parties of the Second Part concurrently herewith; the sole responsibility for taking such action shall be with the Parties of the Second Part.

9. Except as herein amended or modified or except where the provisions of said prior Agreement hereinabove referred to are inconsistent herewith, the said Agreement shall otherwise remain in full force and effect.

In Witness Whereof the parties hereto have hereunto affixed their hands and seals the day and year in this agreement first above written.

Party of the First Part:

/s/ E. F. SMITH.

Parties of the Second Part a co-partnership doing business under the firm name and style of Jim Dandy Markets:

/s/ CHARLES SCHUSTER,

/s/ LEO A. GOLDBERG,

/s/ EARL I. SWETOW,

/s/ MAX M. BERICK,

/s/ NORMAN SCHUSTER. [67]

EXHIBIT "D"

[Plaintiff's Exhibit No. 8 at Trial]

Sale of Business

Escrow No. 7559-E

ESCROW INSTRUCTIONS

Huntington Park, Calif.

June 13th, 1946.

To Morrison Escrow Company

For the purpose of consummating Bulk Sale, the undersigned E. F. Smith, whose address is....., known herein as Vendor and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership, doing business under the firm name and style of Jim Dandy Markets, whose address is 8451 Crenshaw Blvd., Inglewood, Calif, known herein as Vendee, will hand you within the time limit herein specified funds and documents to enable you to carry out the instructions as herein directed.

Vendor will deposit Bills of Sale executed by him in favor of Vendee covering all machinery, fixtures and equipment of a certain business known as E. F. Smith Public Markets, located at various locations.

Vendee will hand you the sum of \$ No funds— However, vendee and vendor will deposit into escrow an agreement, executed by both vendee and vendor, setting forth, among other things, the fact that Vendor acknowledges the application of the sum of \$30,000.00 on the total purchase price for the machinery, fixtures and equipment mentioned hereinbefore and further setting forth the fact that the vendee shall pay the balance of said purchase price

Exhibit "D"—(Continued)

in the sum of \$195,000.00 as follows: In installments of \$5,000.00 or more per month, commencing on the 1st day of August, 1946, and on the 1st day of each and every month thereafter until said balance is fully paid, together with interest thereon at the rate of 6% per annum, payable monthly with each principal payments, being the total sale consideration.

Vendor will also deposit into this escrow certain leases, assignments of leases, consents to assignments and/or sub-leases as specified in the aforementioned Agreement for delivery to the vendee in accordance with additional instructions handed you herewith.

In this escrow you are not to be concerned with securing the vendees approval of said leases, assignments of leases, consents to assignments and/or sub-leases, nor are you to be concerned with securing said vendees approval of the inventory to be included in the Bills of Sale called for herein. The delivery of said documents into this escrow by the vendor (or his agent) shall constitute the vendees approval of the terms and conditions and provisions of said documents including the inventory described in each of the Bills of Sale, if the contents of all such documents are approved by both vendee and vendor outside of this escrow and before said delivery is made to your office.

Vendor and/or Vendee will hand you in duplicate Notice of Intended Sale and also Notice of Intended Mortgage if Chattel Mortgage is delivered through this escrow. Said Notice(s) shall provide for the sale, transfer and assignment and/or mortgage and

Exhibit "D"—(Continued)

payment and/or delivery of the consideration on the 5th day of July, 1946, at 10:00 o'clock a.m. at the office of the Morrison Escrow Company, 2640 Zoe Avenue, Huntington Park, California. You are directed to forward at this time One copy of each notice to the County Recorder for Recordation and the other copy to a newspaper of general circulation in.....Township with fee for publication and Request that same be published in accordance with Section 3440 of the Civil Code of the State of California. Except that the notice effecting the Ontario Market is to be published and recorded in San Bernardino County.

Each party will hand you at or before the time set for transfer in above Notice(s) all funds and instruments required from him to enable you to comply with these instructions.

At the time of sale as indicated herein, provided all other conditions of this escrow have been complied with, out of the purchase funds deposited in this escrow you are to pay any and all bills which have been presented against this business that have been approved by the Vendor for payment, and you are to hold sufficient funds to take care of any bills which are presented in this escrow which are not approved by the seller until such time as bills may either have been withdrawn or settlement made thereon.

Also pay and charge to Vendor.

1. Any adjustment chargeable to Vendor.

Balance of sale consideration after payment of

Exhibit "D"—(Continued)

Vendor's bills, costs and adjustments are to be paid to the order of the Vendor, including the delivery of any notes or mortgages, if therein provided, and you are to deliver the Bills of Sale and leases to the order of the Vendee in accordance with additional instructions handed you herewith.

The entire costs of this transaction, including your escrow fee, cost of advertising, charge for drawing of instruments and recording, insurance transfer fee and mortgage clause, and any other costs incurred are to be divided equally between Vendor and Vendee. [68]

The following Adjustments Only are required in this escrow: None.

If the bills presented, together with your costs and charges and the agent's commission, are in excess of funds deposited, you are to hold all funds and documents for further joint instructions from the Vendor and the Vendee.

Morrison Escrow Company Is Not To Be Concerned With Any Unpaid Retail Sales, Beverage, Unemployment, Old Age or Social Security Tax or Contribution or Any Other Tax or Contribution, Unless Otherwise Specifically Instructed in This Escrow.

It is understood that the escrow holder will not be liable to the Vendee or Mortgagee or any other party on account of any property included hereunder which is subject to any conditional sale or lease contracts, or other form of lease, contract or agreement, or Chattel Mortgage, or on account of

Exhibit "D"—(Continued)

liens of any kind or nature, whatsoever, or other defects in title which may exist with respect to any such property.

It is expressly understood by the parties to this escrow that no Chattel Search is required covering the property involved herein, and Morrison Escrow Company is hereby relieved of all liability for not procuring such Chattel Search unless specifically provided for in writing in this escrow.

You will, as my agent, assign any fire insurance policies of mine handed you. You may assume that premiums on said policies have been paid and that the policies have not been hypothecated.

Make disbursements by your check. Documents and checks in my favor to be mailed to my address shown below, unless you are otherwise instructed.

If the conditions of this escrow have not been complied with at the time herein provided you are nevertheless to complete the same as soon as the conditions (except as to time) have been complied with, unless I shall have made written demand upon you for the return of money and/or instruments deposited by me.

No Notice, Demand or Change of Instructions Shall Be Of Any Effect In This Escrow Unless Given In writing By All Parties Affected Thereby: In the event conflicting demands are made or notices served upon you with respect to this escrow, the parties hereto expressly agree that you shall have the absolute right at your election to do either or both of the following: withhold and stop all

Exhibit "D"—(Continued)

further proceedings in, and performance of, this escrow, or file a suit in interpleader and obtain an order from the court requiring the parties to interplead and litigate in such court their several claims and rights amongst themselves. In the event such interpleader suit is brought, you shall ipso facto be fully released and discharged from all obligations to further perform any and all duties or obligations imposed upon you in this escrow, and the parties jointly and severally agree to pay you all costs, expenses, and reasonable attorney's fees expended or incurred by you, the amount thereof to be fixed and a judgment thereof to be rendered by the court in such suit.

You are not to be held liable for the sufficiency or correctness as to form, manner or execution, or validity of any instrument deposited in this escrow, nor as to identity, authority, or rights of any person executing the same, nor for failure to comply with any of the provisions of any agreement, contract, or other instrument filed herein or referred to herein, and your duties hereunder shall be limited to the safekeeping of such money, instruments, or other documents received by you as escrow holder, and for the disposition of same in accordance with the written instructions accepted by you in this escrow.

All parties hereto further agree, jointly and severally, to pay on demand, as well as to indemnify and hold you harmless from and against all costs,

Exhibit "D"—(Continued)

damages, judgments, attorney's fees, expenses, obligations and liabilities of any kind or nature which, in good faith, you may incur or sustain in connection with, or arising out of this escrow, and you are hereby given a lien upon all the rights, titles and interest of each of the undersigned in all escrowed papers and other property and monies deposited in this escrow, to protect your rights and to indemnify and reimburse you under this agreement.

It is agreed by the parties hereto that so far as your rights and liabilities are involved, this transaction is an escrow and not any other legal relation and you are an escrow holder only on the foregoing expressed terms, and you shall have no responsibility of notifying me or any of the parties to this escrow of any sale, resale, loan, exchange, or other transaction involving any property herein described or of any profit realized by any person, firm or corporation (broker, agent and parties to this and/or any other escrow included) in connection therewith, regardless of the fact that such transaction(s) may be handled by you in this escrow or in another escrow.

The instructions may be executed in counterparts, each of which so executed shall, irrespective of the date of its execution and delivery, be deemed an original, and said counterparts together shall constitute one and the same instrument.

Any amended, supplemental, or additional in-

Exhibit "D"—(Continued)

structions given shall be subject to the foregoing conditions.

The Foregoing Terms, Conditions, Provisions and Instructions Have Been Read And Are Understood And Agreed To By Each Of The Undersigned.

By /s/ CHARLES SCHUSTER,

By /s/ LEO A. GOLDBERG,

By /s/ E. F. SMITH [69]

ADDITIONAL ESCROW INSTRUCTIONS

Huntington Park, Calif.

June 13th, 1946

Morrison Escrow Company:

The undersigned E. F. Smith hands you herewith the following documents:

1. Supplementary and Modified Agreement dated June 12th, 1946, executed by E. F. Smith, designated therein as Party of the First Part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership, doing business under the firm name and style of Jim Dandy Markets, designated therein as Parties of the Second Part.

2. Nine Bills of Sale being one on the office furniture, fixtures and equipment located in the premises known as 4209 South Figueroa Street, Los Angeles, California, and one on each of the following described markets: Western Avenue Market, Ontario Market, Sixth Street Market, Atlantic Boulevard

Exhibit "D"—(Continued)

Market, Central Market, Watts Market, Figueroa Street Market, and Norwalk Market.

3. Eight leases, being either original leases, original leases with written assignments, original leases with written assignments and consents to said assignments, or sub-leases, covering the eight aforementioned markets.

I am placing item 1 above described in your hands for collection only of an indebtedness described therein as being in the sum of \$195,000.00 and payable \$5,000.00 or more on the 1st day of each month commencing August 1st, 1946, and so continuing until said sum has been fully paid, together with interest on the unpaid balance of said sum at the rate of 6% per annum, commencing July 1st, 1946, and payable monthly with each principal payment.

The documents described in items 2 and 3 above mentioned are to be delivered to the parties of the second part, as designated in item 1 above described, or their heirs, administrators, executors or assigns, but only when this indebtedness has been fully paid, Except That, upon request of said second parties, you may deliver any of the Bills of Sale as well as the lease and the assignment thereof, pertaining to the market location where the fixtures described in said Bills of Sale are located, when said parties of the second part pay on this indebtedness the sum of money shown in the following schedule, less the applicable percentage of the monthly payments

Exhibit "D"—(Continued)

made prior to the date upon which such demand is presented, to wit:

Western Avenue Market	\$39,975.00	201½%
Ontario Market	28,275.00	141½%*
Sixth Street Market	27,300.00	14 %
Atlantic Market	27,200.00	14 %*
Central Avenue Market	23,400.00	12 %
Watts Market	19,500.00	10 %
Figueroa Street Market	14,625.00	71½%
Norwalk Market	14,625.00	71½%*

\$195,000.00

[* Longhand figures in margin illegible.]

Notwithstanding anything contained in the aforementioned, as soon as the total amount paid into the escrow by the vendee equals the sum of \$195,000.00, all remaining Leases, Sub-Leases, Assignments, and Bills of Sale remaining in this Escrow shall be immediately delivered to the vendees and no further payments shall be due under this escrow agreement. The Bill of Sale on the office fixtures is to be released only when the entire indebtedness is fully paid, rather than when and if the 71½% is paid on the Figueroa Street Market.

It is understood by all parties to this transaction that you are in no way concerned with the terms and conditions of the said Agreement described as item 1 above, nor with the interpretation of any of the provisions thereof. The executed copy of said agreement is deposited in escrow for in-

Exhibit "D"—(Continued)

formation only and the payments thereunder are set forth in the escrow instructions handed you concurrently. Your only responsibility, in-so-far as this collection is concerned, is to see to the proper application of such payments as are received by your office, the immediate transmittal thereof to E. F. Smith, or order, and the delivery of the documents deposited with you in accordance with the provisions of these escrow instructions.

No Amendments or changes in these escrow instructions are to be recognized by you unless submitted in writing and executed by all parties hereto, their heirs, executors, administrators or assigns.

/s/ E. F. SMITH.

Approved: Jim Dandy Markets, a co-partnership.

By /s/ CHARLES SCHUSTER,
Partner,

By /s/ LEO A. GOLDBERG,
Partner. [70]

EXHIBIT "E"

[Plaintiff's Exhibit No. 9 at Trial]

BILL OF SALE

Know All Men By These Presents: That E. F. Smith, hereinafter designated as the Seller, for and in consideration of the sum of One Dollar (\$1.00) and other valuable consideration, lawful money of the United States of America, to him in hand paid, by Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a

Exhibit "E"—(Continued)

co-partnership, doing business under the name and style of Jim Dandy Markets, hereinafter designated as the Buyer, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said Buyer, their executors, administrators and assigns, all store fixtures, equipment and machinery generally referred to in a certain Agreement dated July 1st, 1945 and a certain Supplementary and Modified Agreement dated June 12, 1946, and particularly set forth in Exhibit "C" attached to the sub-lease dated July 1, 1945 to which reference is hereby made and by this reference made a part of this bill of sale, wherein Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, Deceased, is the lessor in the original lease and the undersigned is the original lessee. Said property so leased is referred to as Atlantic Store. This Bill of Sale shall be deposited in escrow as set forth in the Supplementary and Modified Agreement of June 12, 1946 and shall become effective upon the completion of the terms set forth in said Supplementary and Modified Agreement, particularly section 4 thereof.

To Have And To Hold the same to the said buyers, their executors, administrators and assigns forever. And the said seller does for his heirs, executors and administrators, covenant and agree to and with the said Buyer, their executors, administrators and assigns, to warrant and defend the title to the said property, goods, and chattels hereby conveyed,

Exhibit "E"—(Continued)
against the just and lawful [71] claims and demands
of all persons whomsoever.

Dated this 27th day of June, 1946.

/s/ E. F. SMITH.

State of California,
County of Los Angeles—ss.

On the 27th day of June, 1946 before me, the undersigned, a Notary Public in and for said County and State, personally appeared, E. F. Smith, known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ JAS. R. JOHNSTON,
Notary Public in and for the said County and
State. [72]

EXHIBIT "F"
[Plaintiff's Exhibit No. 10 at Trial]

ASSIGNMENT OF LEASE

Know All Men By These Presents: That I, E. F. Smith, of the County of Los Angeles, State of California, for and in consideration of the covenants and agreements set forth in a certain Agreement, dated July 1, 1945 and Supplementary and Modified Agreement, dated June 12, 1946, do hereby sell, assign, transfer and set over unto Charles Schuster,

Exhibit "F"—(Continued)

Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a certain indenture and lease dated February 1, 1942 by and between Thomas A. McLenaghan as administrator of the Estate of E. T. Williams, deceased, and the undersigned, wherein certain land and buildings therein described were demised to the undersigned for a period of five (5) years from August 1, 1942 to August 1, 1947, and that certain indenture and lease dated September 29, 1941 for a term of five (5) years from August 1, 1942 to and including August 1, 1947 at the rental therein stated, together with any renewal or extension of said leases which may be secured by the undersigned, subject to the rents, covenants, and conditions contained in said leases, and herein referred to as Atlantic Store—It Being Understood, However, that this assignment shall not become effective until the assignee herein has complied with all of the terms and conditions in any way affecting the property hereby leased, as set forth in the aforementioned agreement dated July 1, 1945 and the aforementioned supplementary and modified agreement dated June 12, 1946 particularly Section 4 of said Supplementary and Modified Agreement.

It Is Further Understood that the undersigned has heretofore sub-leased the property described in said leases hereby being assigned, and said sub-lease shall be null and void upon this assignment going into effect. It Is Understood, However, that in the event approval by the lessor is necessary to make this [73] assignment and said approval is not se-

Exhibit "F"—(Continued)

cured, the said sub-lease hereinbefore referred to shall remain in effect during the life of the Agreement and the Supplementary and Modified Agreement.

It Is Further Understood and Agreed by and between the parties hereto, that the assignor hereby agrees that the assignees, may, without obtaining the consent or permission of said assignor, sub-lease the whole or any part of the property herein leased, or assign the leases pertaining to such market site, provided permission is necessary and secured by the undersigned to make this assignment.

In Witness Whereof, I have hereunto subscribed my name this 27th day of June, 1946.

/s/ E. F. SMITH.

We, the undersigned have read the foregoing assignment and hereby accept the same and agree to conform with all of the terms and conditions required in the Leases and the Agreements referred to in this assignment.

Dated June 27th, 1946.

/s/ CHARLES SCHUSTER,

/s/ LEO A. GOLDBERG,

/s/ EARL I. SWETOW,

/s/ MAX M. BERICK,

/s/ NORMAN SCHUSTER. [74]

State of California,

County of Los Angeles—ss.

Lester Weisz being by me first duly sworn, deposes and says: That he is the Secretary of Jim

Exhibit "F"—(Continued)

Dandy Markets, Inc., the defendant in the foregoing and above entitled action; that he has read the foregoing Answer of Defendant Jim Dandy Markets, Inc., to Cross-Claim of Defendant E. F. Smith and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ LESTER WEISZ.

Subscribed and Sworn to before me this 29th day of October, 1947.

(Seal) /s/ HARRY G. SADICOFF,
Notary Public in and for said County and
State. [75]

(Affidavit of Service by Mail—1013a—C.C.P.)

State of California,
County of Los Angeles—ss.

Edward I. Harris, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 727 W. Seventh Street, Los Angeles 14, California, that on the 29th day of October, 1947, affiant served the within Answer of Defendant, Jim Dandy Markets, Inc., to Cross-Claim of Defendant E. F. Smith on the Defendant, E. F. Smith, in said action, by placing a true copy thereof in an

Exhibit "F"—(Continued)

envelope addressed to the attorneys of record for said Defendant, E. F. Smith, at the office address of said attorney, as follows: (Here quote from envelope name and address of addressee.) "Clyde Thomas and Milan Medigovich, 411 W. 5th Street, Los Angeles 13, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ EDWARD J. HARRIS.

Subscribed and sworn to before me this 29th day of October, 1947.

(Seal) /s/ HARRY G. SADICOFF,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Oct. 30, 1947. [76]

[Title of District Court and Cause.]

CROSS-CLAIM OF DEFENDANT JIM DANDY
MARKETS, INC., AGAINST DEFENDANT,
E. F. SMITH

Comes now the defendant Jim Dandy Markets, Inc., and for cross-claim against the defendant E. F. Smith, complains and alleges:

I.

That on or about the 29th day of September, 1941, Charles E. Kindig and Daisy Kindig, as Lessors, and the defendant E. F. Smith, as Lessee, entered into a Lease upon certain real property in the City of Bell, County of Los Angeles, State of [77] California; that a photostatic copy of said Lease is attached to the Answer of the defendant Jim Dandy Markets, Inc., to the Cross-claim of the defendant E. F. Smith, marked Exhibit "A", and by reference is made a part hereof as if herein fully set forth.

II.

That on or about the 1st day of February, 1942, Thomas A. McLenaghan, as Administrator of the Estate of E. T. Williams, as Lessor, and the defendant E. F. Smith, as Lessee, entered into a Lease upon certain real property situated in the City of Bell, County of Los Angeles, State of California; that a photostatic copy of said Lease is attached to the Answer of the defendant Jim Dandy Markets, Inc. to the Cross-claim of the defendant E. F. Smith, marked Exhibit "B", and by reference is made a part hereof as if herein fully set forth.

III.

That the real properties described in said Exhibit "A" and Exhibit "B" adjoin each other.

IV.

That there was a building upon said properties known as the "Atlantic Store", which was totally destroyed by fire on the 14th day of January, 1947.

V.

That on the 1st day of July, 1945, the defendant E. F. Smith, as party of the first part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership doing business under the name and style of Jim Dandy Markets, entered into an Agreement, a copy of which is attached to the Answer of the defendant E. F. Smith, marked Exhibit "A", and by reference is made a part hereof as if herein fully set forth. [78]

VI.

That on or about the 12th day of June, 1946, the defendant E. F. Smith, as party of the first part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership doing business under the name and style of Jim Dandy Markets, as parties of the second part, entered into a "Supplementary and Modified Agreement"; that a photostatic copy of said agreement is attached to the Answer of the defendant Jim Dandy Markets, Inc. to the Cross-claim of defendant E. F. Smith, marked Exhibit "C", and by reference is made a part hereof as if herein fully set forth.

VII.

That on or about the 5th day of July, 1945, the predecessor of Jim Dandy Markets, Inc. went into possession of said "Atlantic Store"; that on or about the 5th day of October, 1946, the defendant Jim Dandy Markets, Inc. went into possession of said "Atlantic Store" by virtue of the conveyances and assignment of said "Atlantic Store", and all rights that the partnership known as Jim Dandy Markets had in the leases above referred to, or in the agreements referred to, and was in possession of said "Atlantic Store" at the time the building was destroyed by fire.

VIII.

That concurrently with the execution and delivery of said "Supplementary and Modified Agreement", and in accordance with its terms, covenants and conditions, an escrow was commenced with the Morrison Escrow Company, and Escrow Instructions and Modified Escrow Instructions were given to said Morrison Escrow Company; that a photostatic copy of said Escrow Instructions and said Modified Escrow Instructions are attached to the Answer of the defendant Jim Dandy Markets, Inc. to the Cross-claim of the defendant E. F. Smith, marked Exhibit "D", and by reference is made a part hereof as if herein fully set forth. [79]

IX.

That at the time the said Escrow Instructions and Modified Escrow Instructions were delivered to said Morrison Escrow Company, the defendant E. F. Smith delivered to said Morrison Escrow Company

each and all of the documents required of him to be delivered under the terms, covenants and conditions of said "Supplementary and Modified Agreement" and said Escrow Instructions and Modified Escrow Instructions, including, but not limiting, the following documents, which documents all refer and relate to the said "Atlantic Store":

(a) Lease dated September 29, 1941, between E. F. Smith as Lessee, and Charles E. Kindig and Daisy Kindig as Lessors.

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee, and Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, Deceased.

(c) Bill of Sale dated June 27, 1946, executed by E. F. Smith in favor of Jim Dandy Markets, a partnership; that a photostatic copy of said Bill of Sale is attached to the Answer of defendant Jim Dandy Markets, Inc. to Cross-claim of Defendant E. F. Smith, marked Exhibit "E", and by reference is made a part hereof as if herein fully set forth.

(d) Assignment of Lease dated June 27, 1946, executed by defendant E. F. Smith in favor of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick [80] and Norman Schuster; that a photostatic copy of said Assignment is attached to the Answer of the defendant Jim Dandy Markets, Inc., to the Cross-claim of defendant E. F. Smith, marked Exhibit "F", and by reference is made a part hereof as if herein fully set forth.

X.

That at the time said building known as the "Atlantic Store" was totally destroyed by fire on January 14, 1947, all payments required to be made under the provisions of said "Supplementary and Modified Agreement", and under the Escrow Instructions and Modified Escrow Instructions, have been made, and that all amounts due under said "Supplementary and Modified Agreement" and said Escrow Instructions and Modified Escrow Instructions, as relating to said "Atlantic Store" were fully and completely paid to the defendant E. F. Smith by the Defendant Jim Dandy Markets, Inc. on or about the 19th day of March, 1947, and that no amount due or to become due to said E. F. Smith under said "Supplementary and Modified Agreement" or said Escrow Instructions or Modified Escrow Instructions, is unpaid.

XI.

That said defendant E. F. Smith, on or about the 30th day of July, 1947, was paid in full the sum of \$225,000.00 required to be paid to him under said "Supplementary and Modified Agreement," and immediately after the amounts required to be paid, as relating to the said "Atlantic Store", had been paid, Morrison Escrow Company delivered to the defendant Jim Dandy Markets, Inc., the following documents:

(a) Lease dated September 29, 1941, between E. F. Smith as Lessee, and Charles E. Kindig and Daisy Kindig as Lessors. [81]

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee, and Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, Deceased.

(c) Bill of Sale dated June 27, 1946, executed by E. F. Smith in favor of Jim Dandy Markets, a partnership.

(d) Assignment of Lease dated June 27, 1946, executed by defendant E. F. Smith in favor of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster.

XII.

That at the time the building known as the "Atlantic Store" was totally destroyed by fire on January 14, 1947, the defendant Jim Dandy Markets, Inc. was the owner thereof.

XIII.

That the defendant herein, Fireman's Fund Insurance Company is now, and at all times was, a corporation duly organized under the laws of the State of California; that on or about the 5th day of July, 1945, said Fireman's Fund Insurance Company issued to the defendant E. F. Smith, its policy of fire insurance insuring the defendant E. F. Smith against loss by fire of said building known as the "Atlantic Store", and other buildings on other properties, and said policy is known as No. A-959495.

XIV.

That an actual controversy has arisen between the defendant E. F. Smith and defendant Jim Dandy Markets, Inc. respecting the rights of said Jim

Dandy Markets, Inc. in and to the proceeds of the policy issued by Fireman's Fund Insurance Company hereinabove [82] described; that Jim Dandy Markets, Inc. contends that it is entitled to the proceeds of any recovery had herein by said E. F. Smith as against said Fireman's Fund Insurance Company.

Wherefore, Jim Dandy Markets, Inc. prays that the rights of Jim Dandy Markets, Inc. and said E. F. Smith to the proceeds of any amounts recovered herein against Fireman's Fund Insurance Company be fixed, determined and adjudicated; that said Jim Dandy Markets, Inc. have judgment for such other and further relief as is just and/or equitable.

/s/ HARRY G. SADICOFF,
Attorney for Defendant Jim Dandy
Markets, Inc.

(Verified.)

[Endorsed]: Filed Feb. 10, 1948. [83]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT E. F. SMITH TO
CROSS-CLAIM OF DEFENDANT JIM
DANDY MARKETS, INC.

Comes now defendant E. F. Smith and for answer to the Cross-Claim of defendant Jim Dandy Markets, Inc., says:

I.

Denies that at the time the building known as the

Atlantic Store was totally destroyed by fire on January 14, 1947, or at any other time, the defendant Jim Dandy Markets, Inc., was the owner thereof;

II.

Denies that the defendant Jim Dandy Markets, Inc., is entitled to the proceeds of any recovery by defendant E. F. Smith [85] from Fireman's Fund Insurance Company;

III.

Hereby refers to the answer of defendant E. F. Smith and to the Cross-Claim of defendant E. F. Smith against defendant Jim Dandy Markets, Inc., and incorporates each of them herein as a more complete statement of the position of defendant E. F. Smith in answer to the Cross-Claim of defendant Jim Dandy Markets, Inc.

Wherefore defendant E. F. Smith prays that the defendant Jim Dandy Markets, Inc., take nothing by its Cross-Claim and that the same be dismissed and that this defendant have judgment for cost and for such other and further relief as is just and proper.

Dated 11th day of February, 1948.

/s/ CLYDE THOMAS,

/s/ MILAN MEDIGOVICH,

Attorneys for Defendant E. F. Smith.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 12, 1948. [86]

In the District Court of the United States, Southern District of California, Central Division

Honorable Leon R. Yankwich, Judge.

No. 6833-Y

CENTRAL MANUFACTURERS' MUTUAL
INSURANCE COMPANY, et al.,
Plaintiffs,

vs.

JIM DANDY MARKETS, INC., et al.,
Defendants.

DECISION AND ORDER

The above-entitled cause heretofore tried, argued and submitted, is hereby decided as follows:

I.

On the plaintiffs' complaint seeking declaratory relief, the declaration will be for the defendant as follows:

(a) The defendant Jim Dandy Markets, Inc., had an insurable interest in the building which was covered by the policies of fire insurance dated respectively June 19, 1946 and July 19, 1946, under their conditional sales contract for the assignment of the leasehold, dated June 27, 1946 (Defendant's Exhibit 10). [88]

(b) The loss payable under the policies totaling the sum of \$25,000.00 is due from the plaintiffs to the defendant Jim Dandy Markets, Inc., and is not apportionable between the plaintiffs and the defendant Fireman's Fund Insurance Company, under the policy of insurance between the latter company and

the defendant and cross-claimant, E. F. Smith, dated July 5, 1945.

II.

Under the cross-claim of the defendant E. F. Smith against the defendant Jim Dandy Markets, Inc., a corporation, seeking reformation of that certain assignment of lease, dated June 27, 1946, judgment is ordered in favor of the defendant Jim Dandy Markets, Inc., on the finding that said assignment of lease conveyed to the defendant Jim Dandy Markets, Inc., all the rights, title and interest of E. F. Smith to the leasehold, including all the rights he had to the building thereon, and that there is no showing of mutual mistake in the execution of said assignment.

III.

Under the cross-claim of the defendant Jim Dandy Markets, Inc., against defendant E. F. Smith, judgment is ordered in favor of the defendant E. F. Smith, that the defendant and cross-claimant Jim Dandy Markets, Inc., is not entitled to any of the proceeds of the insurance policy issued to the defendant E. F. Smith by the defendant Fireman's Fund Insurance Company.

For the guidance of counsel in preparing the findings, the Court states the grounds for its conclusions.

The action being based on diversity of citizenship, the rights of the parties under the policies of insurance [89] and under the assignment of lease are governed by state law (*Angel v. Bullington*, 1947,

330 U.S. 183, 191-192). Under California law, the vendee under conditional sales contracts has an insurable interest, as the sole owner of the property. (*Kaufman v. All Persons*, 1911, 16 C.A. 388; *Kavanaugh v. Franklin Fire Ins. Co.*, 1921, 185 C. 307, 311-312.) Such title is not, in any way, affected by the fact that the assignment was executory so far as the vendee was concerned and was dependent for full execution upon the performance by it of certain conditions precedent, i.e., the payment of the full purchase price. For this reason, cases like *Vierneisel v. Rhode Island Insurance Co.*, 1946, 77 C.A. 229, do not apply. There, the court was dealing with an outright sale of real property which did not become effective until the deed had actually been delivered. When this is the case, delivery in escrow does not pass title and any loss on the property by fire is payable to the owner who remains until the delivery of the deed, the sole owner of the property. Here the vendee was in possession and all that remained to be done by him was the payment of the price.

It is also clear, both under California and general law of insurance, that insurance contracts between the plaintiffs and the defendant *Jim Dandy Markets, Inc.* and the insurance contract between the defendant *E. F. Smith* and the defendant *Fireman's Fund Insurance Co.* are distinct and separate contracts of insurance and are not governed by any apportionment clause contained in them. Or, to be more exact, that the loss which, under the decision now announced, the plaintiffs must pay to *Jim*

Dandy Markets, Inc., is not apportionable between the plaintiffs and the Fireman's Fund Insurance Company. (See, *Fireman's Fund etc. v. [90] Palatine Insurance Co.*, 1907, 150 C. 252, 255-256; *Newark Fire Insurance Company v. Turk*, 1925, 3 Cir., 6 F(2) 533; see also, *Insurance Co. of N.A. v. Detroit Security Trust Co.*, 1931, 9 Cir., 51 F(2) 155, 158; *Fidelity etc. Co. v. Fireman's Fund Insurance Co.*, 1940, 38 C.A.(2)1, 5-6; *Hager v. Hanover Fire Ins. Co. of N.Y.*, 1945, D.C. Mo., 64 Fed Sup 948, 952.)

The relief sought by the cross claim is, in like manner, governed by state law. The cross claim charges mutual mistake. Such mistake, to be ground for relief, must be mutual or a mistake of one party which the other at the time knew or suspected. (*California Civil Code*, Secs. 3399-3400-3401; *Auerbach v. Healy*, 1916, 174 C. 60; *Harding v. Robinson*, 1917, 175 C. 534, 541-542; *Burt v. Los Angeles Olive Growers Association*, 1917, 175 C. 668, 675; *National Bank v. Exchange National Bank*, 1921, 186 C. 172, 181; *Coneland Water Co. v. Nickalls*, 1925, 75 C.A. 212, 218-219; *California Trust Co. v. Cohn*, 1932, 214 C. 619, 627; *Goodfellow v. Barritt*, 1933, 130 C.A. 548, 556; *Miller v. Lantz*, 1937, 9 C(2) 544; *California Trust Co. v. Cohn*, 1935, 9 C.A.(2) 33, 40.)

The presumption that a contract expresses the true intention of the parties flows from its voluntary execution. And the burden of showing that it did not conform to such intention rests upon him who seeks to avoid its express terms. See, *Welk v.*

Conner, 1929, 102 C.A. 286, 289; Oakdale Mercantile Co. v. Baer, 1932, 128 C.A. 350, 354; Menning v. Sourisseau, 1933, 128 C.A. 635, 639; California Trust Co. v. Cohn, 1935, 9 C.A.(2) 33, 40.)

Evidence which would warrant reformation must be clear, convincing and "not loose, equivocal or contradictory leaving the mistake open to doubt". (Burt v. Los [91] Angeles Olive Growers Association, *supra*, 675, quoting *Lestrade v. Barth*, 1862, 19 C. 660, 675; and see cases cited under the preceding paragraphs.) The mistake claimed is alleged to have occurred in the instrument denominated "assignment of lease" and dated June 27, 1946. This instrument assigned, sold and transferred to the individuals now composing the Jim Dandy Markets, Inc. "an indenture of lease dated February 1, 1942, between Thomas H. McClenaghan as administrator of the estate of E. T. Williams as lessor and E. F. Smith as lessee."

It is elementary that an assignment of this character carries all the rights, title and interest which the lessee had under the lease which it is sought to assign. (*Bewick v. Mecham*, 1945, 26 C(2) 92, 96.) Unless an exception is specifically contained in the assignment, it carried all the rights of the lessee which he had or which he might exercise. To illustrate: In the case just cited, it was held that such an assignment carried the option to purchase contained in it, although no reference to the fact was contained in the lease. This fact is significant. Because, as I stated during the argument, in all cases of this character, when disputes arise, the

usual claim is that from the failure to refer to a particular right, the inference can be drawn that it was not the intention to cover that right. And so the contention here is made that by the assignment of the lease it was not intended to assign the right which the defendant and cross-claimant Smith had to the building on the premises. It is true that originally the rights of the parties were covered by a sub-lease. But the instrument of June 27, 1946, changed that relationship. It was drawn by the attorney for the defendant and cross-claimant Smith, who testified that he did not discuss the [92] transaction with any of the representatives of the Jim Dandy Markets, Inc., but that he received instructions from Smith's agent to prepare an instrument "assigning" the lease under certain terms. Smith, himself, testified in this court, stating that when casually one of the persons associated with the defendant Jim Dandy Markets, Inc., first broached the subject, he spoke about having the lease "assigned" to them. So we have a situation here where both during the negotiations and in the instruments prepared by the cross claimant's attorney, the parties deliberately used the words "assignment of lease." It follows that they must be charged with having used the words in the sense and meaning which they have in law and that by such use, they intended the full consequence thereof. (See my opinion in *Bowles v. Jung*, 1944, D.C. Cal., 57 Fed. Sup 701, 707-708.) The oral testimony of the cross-complainant Smith and his agent, Johnson, other than as already indicated, amounts to

nothing more than this: That no mention was made as to any rights to the building. The defendant Jim Dandy Markets, Inc., offered no testimony in contradiction. They contented themselves with cross-examining the two persons last named and Mr. Smith's attorney, Mr. Cassidy. The testimony thus elicited does not meet the requirement in such cases. Assuming that Smith actually thought that the building was not included, there is no showing either directly or by inference from the preceding dealings that any of the parties connected with the defendant Jim Dandy Markets, Inc., knew or suspected any mistake as to the import of the assignment or the intention to exclude the rights to the building. To the contrary, the use of the word "assignment" by Mr. Schuster when he first spoke of the matter to Mr. Smith, and the fact that the desire to [93] make "an assignment" was communicated by Mr. Smith's agent to his attorney and that he, in compliance with that instruction, proceeded, in the light of his knowledge of the previous transaction, which he had also handled, to prepare "an assignment" which conveyed whatever rights the cross-claimant Smith had in the lease, show conclusively the absence of any mutual mistake of the type which Section 3399 of the California Civil Code makes the ground for revision of contracts.

This conclusion finds confirmation in the fact that Jim Dandy Markets, Inc., after the execution of the assignment, acted immediately in accordance with the implication of a leasehold assignment by insuring the building and paying for the fire insur-

ance policies which are the basis of this action. Before the assignment the only fire insurance on the building was that carried by Mr. Smith.

Under the circumstances, to revise the contract, as asked by the cross-claimant, would mean the making of a new contract. This a court of equity cannot do.

These considerations lead to the conclusion that, at the time the loss by fire covered by the insurance policies of the plaintiffs occurred, the defendant, Jim Dandy Markets, Inc., was the sole owner of the leasehold interest previously owned by cross-claimant and defendant Smith, including his rights to the building on the premises, the destruction of which by fire resulted in the claim of loss.

Hence the rulings above made.

Counsel for the defendants and respondent will prepare findings under Local Rule 7.

Dated this 15th day of April, 1948.

/s/ LEON R. YANKWICH,
Judge. [94]

Appearances: For the Plaintiffs: Thomas P. Menzies, Esq., and Harold E. Watt, Esq., Los Angeles, California. For the Defendant Jim Dandy Markets, Inc.: Harry G. Sadicoff, Esq. For the Defendant Fireman's Fund Insurance Co.: Hindman & Davis by E. Eugene Davis, Esq. For the Defendant E. F. Smith: Clyde Thomas, Esq. and Milan Medigovich, Esq. All of Los Angeles, Calif.

[Endorsed]: Filed April 15, 1948. [95]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on April 8, 1948, before the Honorable Leon R. Yankwich, Judge of the United States District Court, in the District of Southern California, Central Division, sitting without a jury; said trial was concluded on April 9, 1948. Thomas P. Menzies, Esq. and Harold L. Watt, Esq. appeared as counsel for the plaintiffs; Harry G. Sadicoff appeared as counsel for the defendant Jim Dandy Markets, Inc.; Hindman and Davis, by E. Eugene Davis, Esq. appeared as counsel for the defendant Fireman's Fund Insurance Company; and Clyde Thomas, Esq. and Milan Medigovich, Esq. appeared as counsel for the defendant E. F. Smith.

Oral and documentary evidence was introduced on behalf of both parties, and the Court, having considered the same and [96] the arguments and briefs of counsel filed during the trial, the case was submitted to the Court for its decision, and the Court heretofore, on the 15th day of April, 1948, filed its opinion and decision, indicating specifically the findings to be made with relation to each of the allegations of the Complaint, and the allegations of the Cross-Claims of the defendants, Jim Dandy Markets, Inc., and E. F. Smith. The Court now being fully advised, makes and files the following as its findings of fact:

FINDINGS OF FACT:

I.

The jurisdiction of this Court is based on diversity of citizenship.

(a) Plaintiff, Central Manufacturers Mutual Insurance Company is now, and at the time of the filing of the complaint was, a corporation organized and existing under and by virtue of the laws of the State of Ohio, and was and is a citizen of the State of Ohio, and at all times herein mentioned was and now is authorized to do business in the State of California, and to write policies of fire insurance in said State, and was and is actually engaged in the business of writing said policies in said State of California at all times hereinafter mentioned. The principal place of business of said plaintiff is in the State of Ohio.

(b) Plaintiff, Indiana Lumbersmens Mutual Insurance Company, is now, and at the time of the filing of the complaint was, a corporation organized and existing under and by virtue of the laws of the State of Indiana, and was and is a citizen of the State of Indiana, and at all times herein mentioned was, and [97] now is, authorized to do business in the State of California, and to write policies of fire insurance in said State, and was and is actually engaged in the business of writing said policies in said State of California at all times hereinafter mentioned. The principal place of business of said plaintiff is in the State of Indiana.

(c) The matter in controversy exceeds, exclusive

of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

(d) Defendant E. F. Smith at all times herein mentioned, and at the time of the filing of the Complaint herein, was a citizen and resident of the State of California, residing in the County of Los Angeles, State of California.

(e) Defendant, Jim Dandy Markets, Inc. at the time of the filing of the complaint herein, and at all times herein mentioned, was and is a corporation organized under the laws of the State of California, with its principal place of business in the County of Los Angeles, State of California.

(f) The defendant, Fireman's Fund Insurance Company is a corporation organized and existing under the laws of the State of California, and was and is a citizen of the State of California, and at all times herein mentioned was, and now is, authorized to do business in the State of California, and to write policies of fire insurance in said state, and was and is actually engaged in the business of writing said policies in said State of California at all times hereinafter mentioned. The principal place of business of said defendant is in the City and County of San Francisco, [98] and does business in the County of Los Angeles.

(g) That on or about the 19th day of July, 1946, plaintiff, Central Manufacturers Mutual Insurance Company, issued its standard California fire insurance policy No. F-321452 whereby, for the period from the 19th day of July, 1946, at noon, to the 19th day of July, 1949, at noon, it insured Charles

Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, co-partners doing business under the fictitious firm name of Jim Dandy Markets, against all loss or damage by fire, except as therein provided, to an amount not exceeding \$12,500.00, the premises described as One Story Composition Roof, Frame D Building at 6801 Atlantic Boulevard in the City of Bell, County of Los Angeles, State of California, including foundations, sidewalks, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales, machinery and elevators belonging to and constituting a part of said building; that thereafter, by written endorsement made on or about the 8th day of October, 1946 the name of the insured was changed by said plaintiff, Central Manufacturers Mutual Insurance Company, to the defendant, Jim Dandy Markets, Inc.

(h) That on or about the 19th day of July, 1946, plaintiff Indiana Lumbermens Mutual Insurance Company issued its standard California fire insurance policy No. 3170 whereby, for the period from the 19th day of July, 1946, at noon, to the 19th day of July, 1949, at noon, it insured Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, [99] co-partners doing business under the fictitious firm name of Jim Dandy Markets, against all loss or damage by fire, except as therein provided, to an amount not exceeding \$12,500.00, the premises described as One Story

Composition Roof, D Class building at 6801 Atlantic Boulevard in the City of Bell, County of Los Angeles, State of California, including foundations, sidewalks, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales, machinery and elevators belonging to and constituting a part of said building; that thereafter, by written endorsement made on or about the 7th day of October, 1946 the name of the insured was changed by said plaintiff, Indiana Lumbermens Mutual Insurance Co., to the defendant, Jim Dandy Markets, Inc.

II.

On or about the 29th day of September, 1941, Charles E. Kindig and Daisy Kindig, as Lessors, and the defendant E. F. Smith, as Lessee, entered into a Lease upon certain real property in the City of Bell, County of Los Angeles, State of California; that a photostatic copy of said Lease is attached to the Answer of the defendant Jim Dandy Markets, Inc. to the cross-claim of the defendant E. F. Smith, marked Exhibit "A" in said Answer, and by reference is made a part hereof as if herein fully set forth.

III.

On or about the 1st day of February, 1942, Thomas A. McLenaghan, as Administrator of the Estate of E. T. Williams, Deceased, as Lessor, and the defendant E. F. Smith, as Lessee, entered into

a Lease upon certain real property situated in the City of Bell, County of Los Angeles, State of California; that a [100] photostatic copy of said Lease is attached to the Answer of the defendant Jim Dandy Markets, Inc., to the cross-claim of the defendant E. F. Smith, marked Exhibit "B" in said Answer, and by reference is made a part hereof as if herein fully set forth.

IV.

The real property described in said Exhibits "A" and "B" adjoin each other.

V.

That there was a building upon said properties known as the "Atlantic Store", and which is the building set forth in the respective policies of fire insurance issued by the plaintiffs herein, as aforesaid, which building was totally destroyed by fire on the 14th day of January, 1947. Said building so known as "Atlantic Store" was situated at 6801 Atlantic Boulevard, City of Bell, County of Los Angeles, State of California.

VI.

On the 1st day of July, 1945, the defendant E. F. Smith, as Party of the First Part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership doing business under the name of Jim Dandy Markets, entered into an Agreement, a copy of which is attached to the Cross-claim of the defendant E. F. Smith, marked Exhibit "A" of said Cross-

claim, and by reference is made a part hereof, as if herein fully set forth.

VII.

That on the 5th day of July, 1945, the defendant, Fireman's Fund Insurance Company, by its policy in writing in the form provided for it by the Statutes of the State of California, insured the defendant, E. F. Smith for the term of three years against loss by fire to said building, in an amount not exceeding \$16,700; that on or about the said 5th day of July, 1945, the said co-partnership doing business under the name and style of Jim Dandy Markets, Inc., went into possession of said "Atlantic Store". [101]

VIII.

On or about the 12th day of June, 1946, defendant E. F. Smith, as Party of the First Part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership doing business under the firm name and style of Jim Dandy Markets, as Parties of the Second Part, entered into a "Supplementary and Modified Agreement"; that a photostatic copy of said "Supplementary and Modified Agreement" is attached to the Answer of the defendant Jim Dandy Markets, Inc., to the Cross-claim of the defendant E. F. Smith, marked Exhibit "C" in said Answer, and by reference is made a part hereof as if herein fully set forth.

IX.

On or about the 5th day of July, 1945, the said

Jim Dandy Markets, a co-partnership consisting of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, went into possession of said building known as the "Atlantic Store", which building is described in the policies of fire insurance issued by the plaintiffs herein; that thereafter, and prior to the destruction of said building by fire on January 14, 1947, said partnership assigned, transferred and conveyed to the defendant Jim Dandy Markets, Inc., all rights that said Jim Dandy Markets, a partnership, had under the Agreement dated July 1, 1945 between E. F. Smith and said Jim Dandy Markets, a partnership, and the Agreement dated June 12, 1946 between said E. F. Smith and said partnership, and under the Assignment executed by the defendant E. F. Smith of the Lease, wherein Charles Kindig and Daisy Kindig are the Lessors aforesaid, and the Lease under which Thomas A. McLenaghan, as administrator of the Estate of E. T. Williams, is the Lessor, as aforesaid; that said Assignment by said E. F. Smith of said Leases is set forth in subdivision (d) of Paragraph IX hereof. [102]

X.

Concurrently with the execution and delivery of said "Supplementary and Modified Agreement", and in accordance with its terms, covenants and conditions, an escrow was commenced by the defendant E. F. Smith and said partnership known as Jim Dandy Markets, with the Morrison Escrow Company, and escrow instructions and modified escrow instructions were given; that a photostatic

copy of said Escrow Instructions and said Modified Escrow Instructions are attached to the Answer of the defendant Jim Dandy Markets, Inc. to the Cross-claim of the defendant E. F. Smith, marked Exhibit "D" in said Answer, and by reference is made a part hereof as if herein fully set forth; that at the time said Escrow Instructions and Modified Escrow Instructions were delivered to said Morrison Escrow Company, the defendant E. F. Smith delivered to said Morrison Escrow Company each and all of the documents required of him to be delivered under the terms, covenants and conditions of said Supplementary and Modified Agreement and said Escrow Instructions and said Modified Escrow Instructions, including, but not limiting, the following documents, which documents all refer to the said Atlantic Store which was insured by the policies of fire insurance issued by the plaintiffs herein as aforesaid, and which building was destroyed by fire on January 14, 1947:

(a) Lease dated September 29, 1941, between E. F. Smith as Lessee, and Charles E. Kindig and Daisy Kindig as Lessors.

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee, and Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, Deceased.

(c) Bill of Sale dated June 27, 1946, executed by E. F. Smith in favor of Jim Dandy Markets, a [103] partnership; that a photostatic copy of said

Bill of Sale is attached to the Answer of defendant Jim Dandy Markets, Inc. to Cross-claim of defendant E. F. Smith, marked Exhibit "E", and by reference is made a part hereof as if herein fully set forth.

(d) Assignment of Lease dated June 27, 1946, executed by the defendant E. F. Smith in favor of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster; that said Assignment is in words and figures as follows, to wit:

"ASSIGNMENT OF LEASE"

Know All Men by These Presents: That I, E. F. Smith, of the County of Los Angeles, State of California, for and in consideration of the covenants and agreements set forth in a certain Agreement, dated July 1, 1945, and Supplementary and Modified Agreement, dated June 12, 1946, do hereby sell, assign, transfer and set over unto Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a certain indenture and lease dated February 1, 1942 by and between Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, deceased, and the undersigned, wherein certain land and buildings therein described were demised to the undersigned for a period of five (5) years from August 1, 1942 to Aug. 1, 1947, and that certain indenture and lease dated September 29, 1941 for a term of five (5) years from August 1,

1942 to and including Aug. 1, 1947 at the rental therein stated, together with any rental or extension of said leases which may be secured by the undersigned, subject to the rents, covenants, and conditions [104] contained in said leases, and herein referred to as Atlantic Store—It Being Understood, However, That this assignment shall not become effective until the assignee herein has complied with all of the terms and conditions in any way affecting the property hereby leased, as set forth in the aforementioned supplementary and modified agreement dated June 12, 1946, particularly Section 4 of said Supplementary and Modified Agreement.

“It Is Further Understood that the undersigned has heretofore sub-leased the property described in said leases hereby being assigned, and said sub-lease shall be null and void upon this assignment going into effect. It Is Understood, However, that in the event approval by the lessor is necessary to make this assignment and said approval is not secured, the said sub-lease hereinbefore referred to shall remain in effect during the life of the Agreement and the Supplementary and Modified Agreement.

It Is Further Understood and Agreed by and between the parties hereto, that the assignor hereby agrees that the assignees, may, without obtaining the consent or permission of said assignor, sub-lease the whole or any part of the property herein leased, or assign the leases pertaining to such market site,

provided permission is necessary and secured by the undersigned to make this assignment.

In Witness Whereof, I have hereunto subscribed my name this 27th day of June, 1946.

/s/ E. F. SMITH. [105]

We, the undersigned have read the foregoing assignment and hereby accept the same and agree to conform with all of the terms and conditions required in the Leases and the Agreements referred to in this assignment.

Dated June 27, 1946.

/s/ CHARLES SCHUSTER,

/s/ LEO A. GOLDBERG,

/s/ EARL I. SWETOW,

/s/ MAX M. BERICK,

/s/ NORMAN SCHUSTER.

XI.

That at the time said building known as the "Atlantic Store" was totally destroyed by fire on January 14, 1947, all payments required to be made under the provisions of said Supplementary and Modified Agreement, and under the Escrow Instructions and Modified Escrow Instructions had been made, and that all amounts due under said Supplementary and Modified Agreement and said Escrow Instructions and Modified Escrow Instructions as relating to said "Atlantic Store", was fully and completely paid to the defendant E. F. Smith by the defendant Jim Dandy Markets, Inc. on or

about the 19th day of March, 1947, and that no amount due or to become due to said E. F. Smith under said Supplementary and Modified Agreement, or said Escrow Instructions or Modified Escrow Instructions, is unpaid; that on or about the 30th day of July, 1947, defendant E. F. Smith was paid in full the sum of \$225,000.00 required to be paid to him under said Supplementary and Modified Agreement and under said Escrow Instructions and Modified Escrow Instructions, and immediately after the amounts required to be paid as relating to said "Atlantic Store" had been paid, Morrison Escrow Company delivered to the defendant Jim Dandy Markets, Inc. the following documents:

(a) Lease dated September 29, 1941, between E. F. Smith as Lessee and Charles E. Kindig and Daisy Kindig as Lessors (photostatic [106] copy of which is attached to the answer of the defendant Jim Dandy Markets, Inc., with a cross-claim of the defendant, E. F. Smith, and marked Exhibit "A").

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee and Thomas A. McLenaghan, as Administrator of the Estate of E. T. Williams, deceased (photostatic copy of which is attached to the answer of the defendant Jim Dandy Markets, Inc., with a cross-claim of the defendant, E. F. Smith, and marked Exhibit "B").

(c) Bill of Sale dated June 27, 1946, executed by E. F. Smith in favor of Jim Dandy Markets, a partnership (photostatic copy of which is attached to the answer of the defendant Jim Dandy Markets,

Inc., with a cross-claim of the defendant, E. F. Smith, and marked Exhibit "E").

(d) Assignment of Lease dated June 27, 1946, which is set forth in subdivision (d) paragraph "X" above.

XII.

That each and both of the policies of insurance issued by the plaintiffs herein expressly provided that it was understood and agreed that the property insured stood on leased ground and that at the time the building known as the "Atlantic Store" and described in the policies of fire insurance issued by the plaintiffs herein respectively, was destroyed by fire on January 14, 1947, the defendant, Jim Dandy Markets Inc., the named insured under the policies issued by the plaintiffs herein respectively, was in possession of said building, and said defendant, Jim Dandy Markets Inc., was the [107] sole and unconditional owner of said building so destroyed by fire.

XIII.

That on the 5th day of July, 1945, the defendant Fireman's Fund Insurance Company issued to the defendant E. F. Smith, its policy of fire insurance insuring the defendant E. F. Smith against loss by fire of said building known as the "Atlantic Store" and other buildings on other properties, and said policy so issued by said Fireman's Fund Insurance Company, being No. A-959495.

XIV.

That following the destruction of said building known as the "Atlantic Store", the defendant Jim

Dandy Markets, Inc., within the time required by the respective policies of fire insurance issued by the respective plaintiffs herein, or any extensions thereof, performed all of the conditions on its part required to be performed under the terms of said policies of fire insurance so issued by the plaintiffs herein, and on or about the 9th day of April, 1947, plaintiffs herein and said Jim Dandy Markets, Inc. agreed, in writing, that the sound cash value of said building so destroyed by fire, and immediately preceding its destruction by fire, was the sum of \$32,476.92, no part of which has been paid by the plaintiffs herein to said Jim Dandy Markets, Inc., and each of the plaintiffs herein have, since the 9th day of April, 1947, failed, neglected and refused to pay to the defendant Jim Dandy Markets, Inc., any amount on account of said loss.

XV.

That each and all of the policies of insurance referred to herein were in the form prescribed by the laws of the State of California, and contained the following provisions:

“This company shall not be liable under this policy for a greater portion of any loss on the described policy, or for loss by, and expenses of, removal from premises endangered [108] by fire, than the amount hereby insured bears to the entire insurance covering such property, whether valid or not or by solvent or insolvent insurers.”

XVI.

The Court finds that the defendant, E. F. Smith was the sole owner of said building located at 6801 Atlantic Boulevard, Bell, California, on July 5, 1945, and up to and including June 27, 1946, and further finds that on said June 27, 1946, said defendant, E. F. Smith sold, assigned and transferred to the predecessors in interest of the defendant, Jim Dandy Markets, Inc., all of his right, title and interest in said building, and that at no time subsequent to said June 27, 1946, did the said E. F. Smith have any interest in said building other than a lien for the payment of the balance of the purchase price thereof, and at the time of the fire on January 14, 1947, the defendant, E. F. Smith was not the owner of said building, and had, on said January 27, 1946, changed his interest, title and possession in and to said building.

XVII.

The Court further finds that in accordance with the agreement entered into between the defendant, E. F. Smith and the predecessors of the defendant, Jim Dandy Markets, Inc., on June 27, 1946, and by the terms thereof and by the assignment of lease set forth in paragraph "X", subdivision (d) above, the defendant, E. F. Smith sold, assigned and transferred to the predecessors in interest of the defendant, Jim Dandy Markets, Inc., all right, title and interest in and to the building referred to herein, and that there was no other or different agreement between said parties than as evidenced by said written assignment and that said written assignment

embodied the entire agreement between the parties thereto. The Court further finds that the written agreement entered into between the defendant, E. F. Smith and the predecessors in interest of the defendant, [109] Jim Dandy Markets, Inc., consisting of Exhibits "7", "8", "9" and "10" filed herein constituted the entire agreements between said parties, and that said agreements correctly expressed the intention of the parties thereto, and that there was no mistake, either mutual or otherwise, in the drafting of said agreements, including said assignment which intended to and were effective in conveying from the defendant, E. F. Smith to the predecessors in interest of the defendant, Jim Dandy Markets, Inc., all the right, title and interest of said defendant, E. F. Smith in and to said building known as 6801 Atlantic Boulevard, Bell, California, subject only to the right of said defendant, E. F. Smith to receive payment as in said agreements provided.

XVIII.

The Court further finds that the policies of fire insurance issued by the plaintiffs herein insured only the defendant Jim Dandy Markets, Inc., and the policy of fire insurance issued by the defendant, Firemans Fund Insurance Company insured only the interest of the defendant, E. F. Smith, and that said insurance of the plaintiffs on one hand and the defendants, Firemans Fund Insurance Company on the other, were to different parties and upon different subjects of interest. That the insur-

ance of the defendant, Jim Dandy Markets, Inc., from the plaintiffs is not affected by the policy of fire insurance issued by the defendant Firemans Fund Insurance Company or diminished by apportionment thereof.

XIX.

That it is true that the defendant, Jim Dandy Markets, Inc., has at all times claimed that by virtue of the assignment set forth in subdivision (d) of paragraph "X" herein, the building known as the "Atlantic Store" and described in the policies of fire insurance issued by the respective plaintiffs herein, was conveyed to and was the property of said Jim Dandy Markets, Inc., but it was not true that during the negotiations and the discussions between the defendant, E. F. Smith and the predecessors in interest of the defendant, [110] Jim Dandy Markets, Inc., or their brokers or agents, the building was not considered as a subject of the proposed sale by said E. F. Smith to the predecessors in interest of the defendant, Jim Dandy Markets, Inc.; and it is not true that the value of said building was in no wise considered as an element of the sales price agreed upon; and it is not true that said assignment set forth in subdivision (d) of paragraph "X" herein does not correctly contain the agreement between the defendant, E. F. Smith and the predecessors in interest of the defendant, Jim Dandy Markets, Inc.; and it is not true that the defendant, E. F. Smith did not intend to convey said building to the predecessors in interest of the defendant, Jim Dandy Markets, Inc.; and the Court

finds that said defendant, E. F. Smith did intend to convey said building by said assignment to the predecessors in interest of the defendant, Jim Dandy Markets, Inc.; and the Court finds that said defendant, E. F. Smith did intend to convey said building by said assignment to the predecessors in interest of the defendant, Jim Dandy Markets, Inc.; and the Court finds that said defendant, E. F. Smith at the time he executed said assignment described in subdivision (d), of paragraph "X" herein intended to convey and did convey to the predecessors in interest of the defendant, Jim Dandy Markets, Inc., all of his right, title and interest in and to the building known as "Atlantic Store."

XX.

That it is true that at the time said building was destroyed by fire on January 14, 1947, Jim Dandy Markets, Inc., was the sole and unconditional owner of the leasehold interest previously owned by the defendant E. F. Smith, including his rights to the building on the said premises; that it is not true that said assignment set forth in subdivision (d) of paragraph "X" was executed by the defendant E. F. Smith under the mistaken belief that the building so destroyed by fire was not conveyed by said assignment to the predecessor in interest of the defendant Jim Dandy Markets, Inc., [111] and it is not true that said assignment does not truly express the intention of the parties to said assignment. On the contrary, the Court finds that said assignment does truly express the intention of the parties thereto.

By reason of the foregoing facts, the Court now finds the following as its conclusions of law:

CONCLUSIONS OF LAW

1. That it be declared that the defendant, Jim Dandy Markets, Inc., was the sole and unconditional owner of the building herein described and which was destroyed by fire, in contemplation of the terms and conditions of the policies of insurance executed and delivered by the plaintiffs herein and in which policies of insurance the defendant, Jim Dandy Markets, Inc., at the time of the fire, was named as the insured, and said building was insured against loss by fire by said plaintiffs in an amount not exceeding \$12,500 by each plaintiff, and the defendant, Jim Dandy Markets, Inc., is entitled to judgment against each plaintiff in the sum of \$12,500 with interest thereon at the rate of seven (7%) per cent per annum from the 9th day of May, 1947 (30 days after adjuster's agreement) until paid, and its costs herein.

2. That it be further declared that any loss to defendant, Jim Dandy Markets, Inc., by reason of said fire is not apportionable between the plaintiffs and the defendant Firemans Fund Insurance Company under the policy of insurance between said Firemans Fund Insurance Company and the defendant, E. F. Smith.

3. That it be further declared that under the cross-claim of the defendant, E. F. Smith against the defendant, Jim Dandy Markets, Inc., the assignment dated June 27, 1946, referred to in the

Findings conveyed to Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, the predecessors in interest of Jim Dandy Markets, Inc., all the right, title and interest of said E. F. Smith to the leasehold described in said assignment, including [112] all the right that he had to the building destroyed by fire, and that there was and is no showing of mutual mistake or any mistake in the execution of said assignment.

4. That it be further declared that the defendant, Jim Dandy Markets, Inc., is not entitled to the proceeds, if any, of the insurance policy issued to the defendant, E. F. Smith, by the defendant Firemans Fund Insurance Company.

5. That it be further declared that the defendant, Firemans Fund Insurance Company is entitled to go hence and have and recover of plaintiffs its costs and disbursements herein.

Judgment is ordered entered accordingly.

Done in open Court this 18th day of May, 1948.

/s/ LEON R. YANKWICH,
United States District Judge.

(Acknowledgments of Service attached.)

(Duly Verified.)

[Endorsed]: Filed May 18, 1948. [113]

In the United States District Court, Southern
District of California, Central Division

No. 6838—Y.

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, a corporation, INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, a corporation,

Plaintiffs,

vs.

JIM DANDY MARKETS, INC., a corporation, FIREMAN'S FUND INSURANCE COMPANY, a corporation, and E. F. SMITH,

Defendants.

JUDGMENT

The above entitled cause came on regularly for trial on April 8, 1948, before the Honorable Leon R. Yankwich, Judge of the United States District Court, in the Southern District of California, Central Division, sitting without a jury; said trial was concluded on April 9, 1948.

Thomas P. Menzies, Esq., and Harold L. Watt, Esq., appeared as counsel for the plaintiffs; Harry G. Sadicoff, Esq., appeared as counsel for the defendant, Jim Dandy Markets, Inc.; Hindman and Davis by E. Eugene Davis, Esq., appeared as counsel for the defendant, Fireman's Fund Insurance Company; and Clyde Thomas, Esq., and Milan Medigovich, Esq., appeared as counsel for defendant, E. F. Smith.

Oral and documentary evidence was introduced on

behalf of all the parties, and the Court having considered same and the arguments and briefs of counsel filed during the trial, the cause was [116] submitted to the Court for its decision.

The Court heretofore, on the 15th day of April, 1948, filed its opinion and decision indicating specifically the findings to be made with relation to each of the allegations of the complaint and the allegations of the cross-claims of the defendants, Jim Dandy Markets, Inc., and E. F. Smith. And the Court now being fully advised and having made and filed its Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed:

(1) That the defendant, Jim Dandy Markets, Inc., was the sole and unconditional owner of the building known as the Atlantic Store and situated at 6801 Atlantic Boulevard, in the City of Bell, County of Los Angeles, State of California, and which was destroyed by fire, in contemplation of the terms and conditions of the policies executed and delivered by the plaintiffs herein, and in which policies of insurance the defendant, Jim Dandy Markets, Inc., at the time of the destruction of said building by fire was named as the insured, and the said building was insured against loss by fire by each of the plaintiffs in an amount not exceeding \$12,500.

(2) That the defendant, Jim Dandy Markets, Inc., have and recover from the plaintiff, Central Manufacturers' Mutual Insurance Company, a corporation, the sum of \$12,500, with interest thereon at the rate of seven (7%) per cent per annum from

the 9th day of May, 1947, until paid, and its costs herein.

(3) That the defendant, Jim Dandy Markets, Inc., have and recover from the plaintiff, Indiana Lumbermens Mutual Insurance Company, a corporation, the sum of \$12,500, with interest thereon at the rate of seven (7%) per cent per annum from the 9th day of May, 1947, until paid, and its costs herein.

(4) That any loss to the defendant, Jim Dandy Markets, Inc., by reason of the destruction of said building by fire is not apportionable between the plaintiffs and the defendant, Firemans Fund [117] Insurance Company under the policy of insurance between Firemans Fund Insurance Company and the defendant, E. F. Smith.

(5) That the assignment of lease dated June 27, 1946, and executed by the defendant, E. F. Smith, in favor of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, co-partners doing business under the name of Jim Dandy Markets, the predecessors in interest of the defendant, Jim Dandy Markets, Inc., conveyed to the said predecessors in interest of said Jim Dandy Markets, Inc., all right, title and interest of said defendant, E. F. Smith to the leaseholds described in said assignment, including all the right that said defendant, E. F. Smith, had to the building destroyed by fire, and there was and is no showing of mutual mistake or any mistake in the execution of said assignment.

(6) That the defendant, Jim Dandy Markets,

Inc., is not entitled to the proceeds, if any, of the insurance policy issued to the defendant, E. F. Smith, by the defendant, Firemans Fund Insurance Company.

(7) That the defendant, Firemans Fund Insurance Company is entitled to go hence and have and recover of plaintiff its costs and disbursements herein.

Done in open Court this 18th day of May, 1948.

/s/ LEON R. YANKWICH,
United States District Judge.

(Acknowledgments of Service attached.)

(Duly Verified.)

[Endorsed]: Filed May 18, 1948. [118]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice Is Hereby Given that E. F. Smith, defendant above named hereby appeals to the Circuit Court of Appeals for the 9th Circuit from a final judgment entered in this action on May 18, 1948.

Dated this 14th day of May, 1948.

/s/ CLYDE THOMAS,
/s/ MILAN MEDIGOVICH,
Attorneys for Appellant E. F. Smith.

[Endorsed]: Filed June 15, 1948. [121]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Appellant E. F. Smith hereby designates the portions of the record proceedings and evidence to be contained in the record on appeal as follows:

1. Complaint.
2. Answer of Fireman's Fund Insurance Company.
3. Answer of defendant Jim Dandy Markets, Inc.
4. Answer of E. F. Smith together with Smith's Exhibits A and B attached thereto.
5. Cross-claim of defendant E. F. Smith against defendant Jim Dandy Markets, Inc., together with Smith's Exhibit C attached thereto. [122]
6. Answer of defendant Jim Dandy Markets, Inc., to Cross-claim of defendant E. F. Smith together with Jim Dandy Exhibits A, B, D, and E. Jim Dandy Exhibits C and F are omitted as they are the same documents as Smith's Exhibits B and C, respectively.
7. Cross-claim of defendant Jim Dandy Markets, Inc., against E. F. Smith.
8. Answer of defendant E. F. Smith to Cross-claim of defendant Jim Dandy Markets, Inc.
9. Decision and Order.
10. Findings of Fact and Conclusions of Law.
11. Judgment.
12. Plaintiff's Exhibit No. 1 in evidence, Pre-Trial Transcript.

13. Plaintiff's Exhibit No. 2 in evidence, Central Manufacturer's Insurance Policy.

14. Plaintiff's Exhibit No. 3 in evidence, Indiana Lumbermen's Insurance Policy.

15. Plaintiff's Exhibit No. 4 in evidence, Fireman's Fund Policy to Smith.

16. Plaintiff's Exhibit No. 5 in evidence, Lease—Kindig to Smith. Do not copy as this is Exhibit A, Jim Dandy Markets, Inc., Answer to Cross-Claim.

17. Plaintiff's Exhibit No. 6 in evidence, Lease—McLenaghan to Smith. Do not copy as this is Exhibit B, Jim Dandy Markets, Inc., Answer to Cross-Claim.

18. Plaintiff's Exhibit No. 7 in evidence, Supplementary and Modified Agreement. Do not copy as this is Exhibit B, Answer of E. F. Smith.

19. Plaintiff's Exhibit No. 8 in evidence, Escrow Instructions. Do not copy as this is Exhibit D, Answer of Jim Dandy Markets to Cross-Claim of defendant E. F. Smith. [123]

20. Plaintiff's Exhibit No. 9 in evidence, Bill of Sale. Do not copy as this is Exhibit E, Answer Jim Dandy Markets, Inc., to Cross-Claim of E. F. Smith.

21. Plaintiff's Exhibit No. 10 in evidence, Assignment of Lease. Do not copy as this is Exhibit C, Cross-Claim of E. F. Smith against Jim Dandy Markets, Inc.

22. Plaintiff's Exhibit No. 11 in evidence, Adjustment Agreement.

23. Plaintiff's Exhibit No. 12 in evidence, Letter,

Jim Dandy Markets, Inc., to Morrison Escrow Company, dated March 20, 1947.

24. Plaintiff's Exhibit No. 13 in evidence, Agreement. Do not copy as this is Exhibit A, Answer defendant E. F. Smith.

25. Defendant Smith's Exhibit A in evidence, Sub-Lease, E. F. Smith to Jim Dandy Markets, a partnership.

26. Defendant Smith's Exhibit B in evidence, Inventory of all Fixtures, Equipment, and Machinery.

27. Transcript of all Oral Proceedings and Testimony.

MILAN MEDIGOVICH and
CLYDE THOMAS,

Attorneys for Appellant,
E. F. Smith.

By /s/ CLYDE THOMAS.

(Acknowledgment of Service by Mail attached.)

[Endorsed]: Filed June 15, 1948. [124]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Central Manufacturers' Mutual Insurance Company and Indiana Lumbermens Mutual Insurance Company, plaintiffs above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment given and made in the

above entitled action in favor of the defendant Jim Dandy Markets, Inc., and against the plaintiffs, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermens Mutual Insurance Company, and entered on the 18th day [126] of May, 1948, in Civil Order Book No. 50, at Page 717, and from the whole and every part of said judgment.

Dated this 15th day of June, 1948.

THOMAS P. MENZIES and
HAROLD L. WATT,

By /s/ HAROLD L. WATT,
Attorneys for Plaintiffs, Central Manufacturers'
Mutual Insurance Company, a Corporation, and
Indiana Lumbermens Mutual Insurance Com-
pany, a Corporation.

[Endorsed]: Filed June 16, 1948. [127]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON
THE APPEAL

Appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermens Mutual Insurance Company, pursuant to Rule 75, Subsection (d), Rules Civil Procedure, make the following statement of points upon which they intend to rely on this appeal:

1. The Court's finding of fact that at the time the building known as the "Atlantic Store," de-

scribed in the policies of fire insurance issued by the plaintiffs herein respectively, was destroyed by fire on January 14, [128] 1947, the defendant Jim Dandy Markets, Inc., was the sole and unconditional owner of said building so destroyed by fire is contrary to the evidence.

2. The Court's finding of fact that the insurance of the defendant Jim Dandy Markets, Inc., from the plaintiffs is not affected by the policy of fire insurance issued by the defendant Indiana Lumbermens Mutual Insurance Company, or diminished by apportionment thereof, is contrary to the evidence.

3. The Court's finding of fact that the defendant E. F. Smith was not the owner of said building on January 14th, 1947, is contrary to the evidence.

4. The evidence shows that the defendant E. F. Smith had, on January 14th, 1947, an insurable interest in the premises covered by the plaintiffs' fire insurance policies because the bill of sale and assignment of the leases had not been delivered to the Jim Dandy Markets through escrow, and because upon the assignment of the leases by E. F. Smith, he continued to be liable as guarantor for the performance of the covenants of the leases, including the payment of rent.

5. The evidence shows that the defendant Jim Dandy Markets, Inc., was entitled upon payment of the balance of the purchase price, to the benefit of the insurance collectible by defendant E. F. Smith, as vendee.

6. The evidence shows that upon liability for the loss from fire accruing to the plaintiffs, Central

Manufacturers' Insurance Company and Indiana Lumbermans Mutual Insurance Company, as insurers of defendant Jim Dandy Markets, Inc., under the sales contract with defendant E. F. Smith, said plaintiffs were entitled [129] by subrogation to have the benefit of the insurance carried by defendant E. F. Smith on said premises, thus reducing the loss to the Jim Dandy Markets, Inc., for which the plaintiffs were liable.

THOMAS P. MENZIES and
HAROLD L. WATT,

By HAROLD L. WATT,

Attorneys for Appellants, Central Manufacturers'
Mutual Insurance Company and Indiana Lum-
bermens Mutual Insurance Company.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 24, 1948. [130]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermens Mutual Insurance Company, pursuant to Rule 75, Subsections (a) and (k), Rules Civil Procedure, adopt as their designation of the portions of the record, proceedings, and evidence to be contained in the record

on appeal, the designation of contents of record on appeal heretofore filed by appellant E. F. Smith.

THOMAS P. MENZIES and
HAROLD L. WATT,

By HAROLD L. WATT,
Attorneys for Appellants, Central Manufacturers'
Insurance Company and Indiana Lumbermens
Mutual Insurance Company.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 24, 1948. [133]

PLAINTIFFS' EXHIBIT NO. 1

In the District Court of the United States in and
for the Southern District of California, Central
Division.

Honorable Peirson M. Hall, Judge presiding.

No. 6838-PH—Civil

CENTRAL MANUFACTURERS' MUTUAL
INSURANCE COMPANY, a Corporation,
INDIANA LUMBERMENS MUTUAL
INSURANCE COMPANY, a Corporation,
Plaintiffs,

vs.

JIM DANDY MARKETS, INCORPORATED,
a Corporation,
FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,
E. F. SMITH,
Defendants.

REPORTER'S TRANSCRIPT OF PRETRIAL
HEARING

Los Angeles, California

November 17, 1947

Appearances: For the Plaintiffs: Thomas P.
Menzie, Esq., 548 South Spring Street, Los Angeles
13, California. [137] For the Defendant Jim Dandy
Markets, Incorporated: Harry G. Sadicoff, Esq.,
727 West Seventh Street, Los Angeles 14, Califor-
nia. For the Defendant Fireman's Fund Insurance
Company: Hindman & Davis, 607 South Hill Street,
Los Angeles 14, California; by E. Eugene Davis,

Plaintiffs' Exhibit No. 1—(Continued)

Esq. For the Defendant E. F. Smith: Clyde Thomas, Esq., 411 West Fifth Street, Los Angeles 13, California. [138]

(In chambers.)

The Court: Is there a stipulation in this matter?

Mr. Menzies: We were willing to stipulate, as I called the Court's attention to on the last proceedings in open court a week ago. The stipulation was prepared by Mr. Sadicoff, as he indicated he would do, and submitted it to the rest of us. I have proposed certain amendments thereto, and I believe Mr. Thomas proposed some amendment, and when those proposed amendments were submitted, as Mr. Sadicoff indicated, if we agreed to those facts he would be out of court.

Mr. Sadicoff: I don't think that Mr. Thomas submitted any.

Mr. Thomas: No, I didn't.

Mr. Menzies: I submitted the amendment along this line, that none of the acts or declarations that occurred between the owner, Mr. Smith, and the Jim Dandy Markets, in so far as their contractual negotiations are concerned, were done with either the knowledge or consent of the plaintiff, and that seemed to stop the proceedings right there.

However, since that time Mr. Thomas has filed a cross bill against the Jim Dandy Markets and the Jim Dandy Markets have filed an answer thereto. It now develops that apparently [139] there was at most an option to purchase, at least that is the construction that I placed upon the documents that are

Plaintiffs' Exhibit No. 1—(Continued)

in the file, and I believe the Court will if it looks at the answer of the Jim Dandy Markets to the cross bill. There are a number of exhibits attached to it which seems to indicate that.

Now if that is the case we don't dispute those facts. I believe that the matter will be in shape for a motion for summary judgment so far as the plaintiffs are concerned.

You will note that the contract that was drawn up—you may call it whatever you please—apparently only grants to the Jim Dandy Markets the option to purchase upon the fulfillment of the terms and conditions of that contract.

There are a number of interesting features that appear in that contract with relation to its terms and conditions. The first will be found on page 1 of the photostatic copy of the contract, in paragraph 1, wherein they merely agree to sell to the party of the second part, agree to purchase, all of the fixtures, machinery and equipment contained, located and contained, in all of the markets referred to in the agreement for the sum of \$225,000. There was payment in good faith so far as the option is concerned, and that is to—

The Court: Suppose we do not discuss the merits now. There isn't anything that can be done in a pretrial conference [140] and anything that can be done on the motion for summary judgment, why do you not submit a motion to try it?

Mr. Menzies: I think this should be done here at the pretrial conference, your Honor. We should

Plaintiffs' Exhibit No. 1—(Continued)

agree to certain facts that I think there is no dispute about as between all of the interested parties, and if counsel would be willing to stipulate that the fire occurred on the morning of January 14, 1947, that the alarm was turned in at 3:04 a.m., that the fire department got there at 3:10; that 14 minutes before the fire occurred the radio car passed the place of business that burned and the lights were out, that immediately prior to the fire an explosion was heard by neighbors—there was a night watchman there at the fire, I believe his name was Smith, I don't recall—and that at the time of the fire he was in the premises, went out and discovered the fire in the rear portion of the building; that he went to a telephone two blocks away and phoned in an alarm, although there were several phones in the place—that is, pay phones—that along about 2:15 in the morning—

The Court: What is the materiality that he went to the phone two blocks away?

Mr. Sadicoff: Can't we stipulate that there was a fire on January 14th? What is the necessity for all of this detail?

Mr. Menzies: I think we ought to have all the facts and [141] circumstances surrounding the cause and the origin of that fire, if any.

The Court: Is there some issue in connection with it?

Mr. Menzies: Only as to the occurrence of the fire, your Honor.

The Court: As to what caused it?

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: I don't think anybody knows what caused it.

The Court: Is there any issue as to what caused it?

Mr. Menzies: No, we didn't raise that.

The Court: Why is it material then?

Mr. Sadicoff: You don't contend it was of incendiary origin and that we originated it, do you?

Mr. Menzies: No, I can't prove that.

Mr. Sadicoff: I don't see the necessity of it then.

Mr. Davis: What is the object of it? This is something new to me.

Mr. Menzies: It is merely circumstances surrounding the fire, that it did occur in that manner.

Mr. Davis: That is all I had ever heard, that it was a fire.

Mr. Sadicoff: That is all I heard.

Mr. Menzies: And these various documents—

The Court: In other words, you all stipulate that on this date, January 14, 1947, in the morning, the building was destroyed by fire? [142]

Mr. Menzies: That is right.

The Court: Of unknown origin?

Mr. Menzies: That is right. That is satisfactory.

The Court: Is that agreed to?

Mr. Thomas: Yes.

Why not put in the value, as far as the value of the building goes?

The Court: Let us just get one thing at a time.

That is agreed to. What is next?

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: That there were two policies of insurance issued by the plaintiffs, each in the sum of \$12,500, that the named assured in those policies was the Jim Dandy Markets, Inc. At the time of the fire, that without knowledge or consent of the parties the various documents, that is, the agreement or option to purchase, and the supplemental agreements that resulted from that original agreement, and the escrow and instructions were executed by the defendant Jim Dandy Markets and E. F. Smith without the knowledge or consent of the plaintiffs.

The Court: Is that agreed to?

Mr. Sadicoff: No, sir.

Mr. Davis: Mr. Menzies, I don't want to interrupt you, but I went through the stipulation that Mr. Sadicoff prepared. Have you any objection to any of it?

Mr. Menzies: Yes, I prepared some amendments. [143]

Mr. Davis: You prepared some supplementary matters, but so far as he had prepared it in his stipulation—I understood you okayed it, Mr. Thomas.

Mr. Thomas: Not as to the facts subsequent to the fire. I objected to that. That is why I hadn't written in.

Mr. Davis: But beyond that?

Mr. Menzies: I haven't any objection to it.

Mr. Davis: I am thinking that what you are

Plaintiffs' Exhibit No. 1—(Continued)

talking about are written instruments, these parties entered into written instruments, something that you and I have nothing to do with. We didn't engage in that.

Mr. Menzies: That is correct. But Mr. Sadicoff said that he will not agree to that.

The Court: He will not agree to what?

Mr. Menzies: That we had no knowledge of any of the facts or circumstances.

The Court: Well, before we get to that, let us take the other matter up. It is stipulated that these agreements—are they all set up in the pleadings?

Mr. Sadicoff: Every document is set up in the answer of the defendant Jim Dandy Markets as to the cross-claim of E. F. Smith, excepting the two insurance policies issued by the plaintiffs in this action, and Mr. Menzies and I have this day agreed, and I have exhibited to him, the two policies and he has to me, that those policies are true and correct. [144]

The Court: Are they set forth here?

Mr. Sadicoff: No, sir. I can furnish photostatic copies of them.

The Court: Does the answer of Jim Dandy Markets contain as exhibits all of the documents that are material to this case and that were executed between—

Mr. Sadicoff: Smith and Jim Dandy Markets; yes.

The Court: Some were executed by others?

Mr. Sadicoff: Yes.

Plaintiffs' Exhibit No. 1—(Continued)

The Court: Here is the lease of Charles E. Kingdig. Let us take that. It is stipulated that the lease attached as Exhibit A to the answer of Jim Dandy Markets to the cross-claim and defendant was executed on or about the date it bears by the parties purporting to execute it?

Mr. Thomas: Yes.

Mr. Davis: Yes.

Mr. Menzies: I will so stipulate.

Mr. Davis: Executed and delivered.

Mr. Sadicoff: Yes, sir.

The Court: Executed and delivered?

Mr. Menzies: Yes, sir.

The Court: Exhibit B appears to be a letter addressed to E. F. Smith, dated February 1, 1942.

Mr. Sadicoff: That is part of the exhibit that follows.

The Court: That Exhibit B, consists of that letter of [145] February 1, 1942 and another lease executed by the parties purporting to execute it on or about the date it bears, and delivered?

Mr. Thomas: Yes.

Mr. Davis: Yes.

Mr. Menzies: So stipulated.

Mr. Sadicoff: And referred to in the answer of Jim Dandy Markets as Exhibit B.

The Court: Exhibit C attached to that answer just described, supplementary and modified agreement, between E. F. Smith, Charles Schuster and others, was executed on or about the date it bears by the parties who purport to have executed it?

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: So stipulated.

Mr. Sadicoff: So stipulated.

Mr. Davis: Yes.

Mr. Thomas: Yes.

The Court: And Exhibit D, escrow instructions attached to the answer as Exhibit D, were executed on or about the date they bear by the parties purporting to execute it? That is, Jim Dandy Markets by Charles Schuster, by Leo Goldberg and by E. F. Smith and delivered to the escrow holder. Is that stipulated to?

Mr. Thomas: Yes.

Mr. Davis: Yes. [146]

Mr. Menzies: So stipulated.

Mr. Sadicoff: Yes, so stipulated.

The Court: And that Exhibit E, a bill of sale attached to the complaint as Exhibit E, was executed on or about the date it bears by the party purporting to have executed it and delivered to the escrow holder?

Mr. Menzies: So stipulated.

Mr. Sadicoff: Yes.

Mr. Davis: Yes.

Mr. Thomas: So stipulated.

The Court: Likewise the assignment of lease, Exhibit F, executed on or about the date it bears and by the parties purporting to execute it, and delivered to the escrow holders?

Mr. Thomas: Yes.

Mr. Menzies: So stipulated.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: Yes.

Mr. Davis: Yes.

The Court: Were these delivered to the escrow holders?

Mr. Menzies: That is something I don't know.

Mr. Thomas: That was part of the stipulation in each instance.

The Court: On or about the date it bears.

Mr. Menzies: Is that the correct date or is that merely the date the instrument was executed?

Mr. Thomas: I don't think there is any variable that is [147] significant there. It may have been the next day.

Mr. Menzies: On or about the date.

Mr. Thomas: On or about, the stipulation was.

Mr. Menzies: That is satisfactory.

Mr. Thomas: Is that correct, it was on or about that date?

Mr. Sadicoff: Yes.

Mr. Thomas: There is nothing significant in the variable of the date?

Mr. Sadicoff: That is correct.

The Court: And that on the date of the fire these were still in escrow, these documents that were delivered to the escrow holders?

Mr. Sadicoff: Yes, sir.

Mr. Thomas: Yes, sir.

The Court: They had never been taken out of escrow?

Mr. Sadicoff: No, sir. And that all payments

Plaintiffs' Exhibit No. 1—(Continued)

that were due under Exhibit D, that were due to E. F. Smith, up to and including the day of the fire, had been paid.

Mr. Thomas: Only due on the one instrument.

The Court: Exhibit C is the supplemental and modified agreement?

Mr. Sadicoff: That is right.

The Court: All the payments due Smith had been made?

Mr. Sadicoff: All the payments due Smith had been made, [148] and subsequently all payments that became due.

The Court: Let us leave out "subsequently." Let us get up to the date of the fire. Prior to the date of the fire that had been done. All right.

Where are the insurance policies?

Mr. Sadicoff: Right here. We have been so busy in the office we haven't been able to make photostats.

The Court: Have you exhibited them to the parties?

Mr. Menzies: I have seen them, your Honor.

Mr. Davis: I haven't seen them.

Mr. Thomas: I haven't either.

(The documents referred to were passed to counsel.)

Mr. Davis: I think they are wholly immaterial, as far as I am concerned, but we will look them over.

Mr. Thomas: We are just talking about the

Plaintiffs' Exhibit No. 1—(Continued)
execution of the instruments. We needn't take any time with this. For whatever they are worth, there is no question of these being the right instruments, and that is all we are talking about.

Mr. Menzies: I don't question them.

Mr. Davis: They were executed and delivered on the date they bear.

Mr. Sadicoff: Please don't take them away from me. I haven't got photostats of them yet.

The Court: You can get them from the Clerk.

Mr. Sadicoff: Mr. Thomas, I furnished Mr. Medigovich [149] with copies of these. Do you have them?

Mr. Thomas: I don't think so. He may have them and they may be some place but I didn't happen to notice them.

Mr. Sadicoff: Will you gentlemen and the Court trust me with those documents for two days until I can get photostats because I want more than one photostat?

Mr. Davis: I will, because we haven't our policy here either.

Mr. Menzies: I haven't any objection. Let us have it marked by the Clerk and then he can photostat them.

The Court: That will be Smith's A.

Mr. Sadicoff: You will return them to me so I can get them photostated?

The Court: Yes.

Mr. Thomas: That is not Smith's documents. That shouldn't be marked Smith's exhibit.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: It is the policy issued by the plaintiff in this action, Jim Dandy Markets.

Mr. Davis: Make them plaintiffs' exhibit.

The Court: I want to give them a number. These will be Jim Dandy Markets Exhibit A.

Mr. Davis: All in one?

The Court: Yes.

Mr. Menzies: That will be the two policies?

The Court: Yes. [150]

(The documents referred to were marked Jim Dandy Markets Exhibit A for identification.)

The Court: The stipulation is that these policies, together with their riders and indorsements, were executed on or about the date they bear and delivered to and in the possession of the Jim Dandy Markets prior to the time and at the time of the fire?

Mr. Menzies: So stipulated.

Mr. Sadicoff: That is right.

The Court: And that the premiums are paid on them?

Mr. Menzies: So stipulated.

Mr. Thomas: So stipulated.

Mr. Davis: Yes.

Mr. Sadicoff: And at the time of the fire the assured was the Jim Dandy Markets, Inc.

Mr. Davis: That shows on the policy.

Mr. Menzies: That shows on the face of it. I will stipulate to that.

Plaintiffs' Exhibit No. 1—(Continued)

The Court: Whatever it is. This only says Jim Dandy, Inc.

Mr. Menzies: Jim Dandy is the only name insured in the policy.

The Court: It doesn't say Jim Dandy, Inc.

Mr. Sadicoff: Yes.

Mr. Menzies: There is an indorsement blank down on the [151] second page.

The Court: Charles Schuster doing business as Jim Dandy Markets, Inc. I see. All right. That covers those then.

Mr. Sadicoff: Do you want me to file the originals or do you want me to file photostats?

Mr. Menzies: Let's have the originals in the file.

Mr. Sadicoff: All right. I will deliver the originals to the Clerk not later than Thursday of this week.

Mr. Menzies: I think the Clerk should mark the originals and the indorsements on there and then Mr. Sadicoff can photostat them.

Mr. Sadicoff: I have no objection to that.

The Court: He can photostat them this way and submit them.

Mr. Menzies: I was thinking if we had copies it would show that.

The Court: It does not make any difference one way or the other. Whichever is the most convenient to get it done.

All right. We have the insurance policies now out of the way.

Mr. Davis: May I ask one question, Mr. Sadi-

Plaintiffs' Exhibit No. 1—(Continued)

coff? We just read one assignment of lease where there were two leases but only one assignment. What does that mean? I didn't read it through.

Mr. Sadicoff: The assignment was of both leases? [152]

Mr. Thomas: That is right.

The Court: What else can we stipulate to? Are there other policies or other documents involved in this?

Mr. Thomas: Yes.

The Court: Let us get all of the documents out of the way.

Mr. Davis: The defendant Fireman's Fund, as I said before, I still don't see where we have any issue here, but the defendant Fireman's Fund will stipulate that on the 5th of July 1945 it executed and delivered its policy of insurance to E. F. Smith, a copy of which will be furnished and filed and marked in whichever way the Court desires.

The Court: Have you all examined it?

Mr. Menzies: I have never seen it.

Mr. Sadicoff: I have.

The Court: Do you have the policy here?

Mr. Davis: No, I just have a certificate of it. He has the policy.

Mr. Thomas: I have the policy.

The Court: On what date was it?

Mr. Thomas: 5th of July.

The Court: July 5, 1945, and that the premiums were paid on it?

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Davis: That the policy had not been canceled, but I will not stipulate that it was in full force and effect. [153] I will go that far.

The Court: Very well. Do you have any more documents?

Mr. Davis: That is all.

Mr. Thomas: There is another document that is in my answer, the original agreement of which the supplemental was already agreed to.

The Court: The answer of E. F. Smith?

Mr. Thomas: Yes. It is Exhibit A, as I remember it, the agreement to which the supplemental is a supplemental.

The Court: Then it is stipulated that the agreement attached as Exhibit A to the answer of E. F. Smith, dated the 1st of July of 1945, between E. F. Smith and Charles Schuster and others, was executed by the parties purporting to execute it on or about the date it bears and mutually delivered?

Mr. Sadicoff: So stipulated.

Mr. Thomas: Yes.

The Court: And that the supplemental agreement and modified agreement—well, it speaks for itself.

Mr. Thomas: That is the same.

The Court: That speaks for itself.

Now do you have any other documents?

Mr. Menzies: Your Honor, before we proceed to other documents, in regard to the two insurance policies, I think I was in error when I said they

Plaintiffs' Exhibit No. 1—(Continued)

were in full force and effect in that stipulation. It should be that they were issued and in [154] the hands of the defendant Jim Dandy Markets.

The Court: And had not been canceled?

Mr. Menzies: They had not been canceled; no.

The Court: Is that modification of the stipulation accepted?

Mr. Sadicoff: Yes.

Mr. Menzies: And the other stricken out, that they were in full force and effect.

The Court: Any other documents?

Mr. Thomas: No, I think not.

The Court: You had no insurance policy?

Mr. Thomas: I am going to bring it. That is the one Mr. Davis is talking about. That is our policy.

The Court: We have only three policies then?

Mr. Thomas: That is right. Smith had one and the others two.

The Court: Have you any other documents?

Mr. Menzies: I can't think of any.

The Court: That is all the documents then.

What else can you stipulate to?

Mr. Sadicoff: I think it should be stipulated—

The Court: Let me see, that Jim Dandy Markets the partnership was converted to a corporation?

Mr. Menzies: We won't raise any point on that. It is indorsed on the policy. [155]

Mr. Sadicoff: That the rights of the partnership theretofore existing under the name of Jim Dandy

Plaintiffs' Exhibit No. 1—(Continued)

Markets, Inc., and prior to the fire had been transferred by mean conveyance to Jim Dandy Markets, Inc.?

The Court: A California corporation?

Mr. Sadicoff: Yes, sir.

Mr. Menzies: I will stipulate to this, that Jim Dandy Markets, Inc., by indorsement, were placed as the named assured on the policy.

Mr. Davis: The policy speaks for itself.

The Court: You have already covered that.

Mr. Menzies: That they had whatever rights, if any, that the partnership had. They succeeded to whatever rights, if any, the partnership had under that policy.

The Court: Prior to the fire?

Mr. Menzies: Prior to the fire.

The Court: That is the corporation known as Jim Dandy Markets, Inc.?

Mr. Menzies: That is correct. They succeeded to whatever interests—

The Court: Whatever rights the fictitious firm name and partnership previously had?

Mr. Menzies: That is right.

The Court: Under the policies?

Mr. Menzies: [156] Yes.

Mr. Sadicoff: That is right. And any rights that Jim Dandy Markets, the partnership, previously had.

The Court: Is one of those agreements there a transfer to the corporation?

Mr. Sadicoff: No.

Plaintiffs' Exhibit No. 1—(Continued)

The Court: Why do you not bring in that agreement?

Mr. Sadicoff: We can produce it.

Mr. Davis: I don't think there is any controversy about it.

Mr. Menzies: There is no controversy about it, and therefore it is easier to stipulate to it.

The Court: It is stipulated that they succeeded to all of the rights and interests of the partnership existing under any and all of these agreements?

Mr. Sadicoff: As relating to the so-called Atlantic store, because there was a division. We had, I think, eight or nine units.

The Court: As related to the Atlantic store?

Mr. Sadicoff: As related to the Atlantic store.

The Court: Is that stipulated?

Mr. Thomas: I am not admitting any third party rights as against my cross-claim there as would make a difference that I would waive any rights on the theory that I have admitted there was possibly an innocent third party succeeding to the rights and didn't accept the responsibilities. [157]

The Court: With that reservation is the stipulation agreeable?

Mr. Sadicoff: Yes, that is agreeable.

Mr. Menzies: I have no interest in that.

Mr. Davis: That is satisfactory with me.

The Court: Any other documents?

Mr. Menzies: Yes, I think one other thing.

Mr. Sadicoff: I think we should have a stipulation as to the value of the building.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: There is one other document.

The Court: What about proof of claim?

Mr. Menzies: That has all been taken care of, your Honor, with an adjuster's agreement as to the value and the loss and damage. I think that that should be in evidence.

The Court: Where is that?

Mr. Menzies: Mr. Sadicoff has that.

There is one other item that I don't want to forget and that is the time of payment in the escrow clause. Do you have the date of that, when they exercised their option after the fire?

Mr. Sadicoff: There wasn't any option. We are not going to stipulate to any option. There was no option.

The Court: Are there any documents prior to the fire? All this is before the fire?

Mr. Menzies: There is none that I know of. Do you know [158] of any, Mr. Thomas?

Mr. Thomas: No, I can't think of any.

Mr. Menzies: Mr. Sadicoff, do you have any others?

Mr. Sadicoff: I don't know of any.

The Court: Now you are offering to stipulate to the amount of the loss.

Mr. Sadicoff: Here is the adjuster's agreement.

The Court: What is it, in duplicate, triplicate, or what?

Mr. Davis: I have never seen it.

Mr. Sadicoff: We stipulated that there is that

Plaintiffs' Exhibit No. 1—(Continued)

other policy covering the premises, but not the same interests.

Mr. Davis: The policies speak for themselves.

Mr. Menzies: The policies speak for themselves.

Mr. Davis: I will, for the purpose of this case, and for that purpose only, because we don't know, stipulate that your loss and damage was \$32,476.92 as shown here.

The Court: As a result of the fire?

Mr. Davis: As a result of the fire.

The Court: Is that the loss and damage to the building now?

Mr. Davis: To the building described.

Mr. Sadicoff: Building only. So stipulated.

Mr. Menzies: So stipulated.

Mr. Thomas: So stipulated. [159]

The Court: Very well.

Mr. Menzies: I think that should be in evidence, that adjuster's agreement.

Mr. Davis: That is all there is in it.

Mr. Menzies: I still think it should be in evidence. Of course the record will show that there is other insurance in effect.

Mr. Davis: That wouldn't be binding on me or binding on anybody.

The Court: Do you think it is necessary?

Mr. Menzies: It does show in the record.

Mr. Thomas: You have two policies in the record already.

Mr. Menzies: That is all.

Plaintiffs' Exhibit No. 1—(Continued)

The Court: If you don't have any objection, why not put it in evidence?

Mr. Davis: I am not bound by anything in it except my stipulation. They can put it in if they want to. I don't care.

The Court: Then you don't need to offer it now. Just make the stipulation. We are only taking things that everybody can stipulate to.

Mr. Sadicoff: How about you, Mr. Thomas, on your proofs?

Mr. Thomas: They were made—

Mr. Davis: If there weren't there will be no question raised on them anyway.

Mr. Thomas: The record was in shape there and there is [160] a proof. There are copies in the files.

Mr. Davis: As between your client?

Mr. Thomas: Yes.

Mr. Davis: If they were, it is okay with me, but if they were not it is stipulated between you and me that for the purpose of this case no question is being raised as to whether or not proofs were made.

Mr. Thomas: All right.

The Court: Those proofs will be put in evidence the proofs of loss?

Mr. Thomas: Yes.

Mr. Davis: I don't know if they were made or not.

The Court: Does this affect this?

Mr. Menzies: We have no interest in that.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: We have no interest in it so far.

The Court: Very well. What next can we stipulate to?

Mr. Menzies: The date that Jim Dandy placed a sum, I think \$27,300 or \$27,500, into it after the fire.

Mr. Thomas: No, it is in the file.

Mr. Sadicoff: I think it is alleged in the answer.

Mr. Thomas: I can't see the purpose of it in this case.

Mr. Davis: I don't think you stipulated to everything that was in Mr. Sadicoff's stipulation.

Mr. Menzies: This is a different matter.

Mr. Sadicoff: Do you have a copy of the prepared [161] stipulation, Mr. Menzies?

Mr. Menzies? Yes. I have it right here I think, but I don't think it is set up in there. I don't recall it.

Mr. Thomas: I didn't look that up because I didn't have it.

Mr. Menzies: I looked for it.

Mr. Sadicoff: I am quite sure it is in there. Let me find my copy.

Mr. Menzies: Here is the yellow copy, if that will help you.

Mr. Davis: I don't think you put the date of that payment in here. You just say, within a few days after payment was received.

Mr. Sadicoff: I think we should have a stipulation that as of the date of the fire the Jim Dandy

Plaintiffs' Exhibit No. 1—(Continued)
Markets, Inc., were in possession of the destroyed premises.

Mr. Davis: So stipulated.

Mr. Thomas: Yes, that is the fact.

Mr. Menzies: That is agreeable.

Can anybody fix the date of that payment?

Mr. Sadicoff: I think I can.

Mr. Davis: I think if I were stipulating for Jim Dandy I would also stipulate the date of the execution and delivery of the plaintiff's policy. But that is your business, Mr. Sadicoff. [162]

Mr. Menzies: But Jim Dandy wasn't.

Mr. Davis: They are the predecessor in interest. Was the Jim Dandy partnership or Jim Dandy Markets in possession of this building at the time the plaintiffs' policies were issued?

Mr. Sadicoff: Our successors were in possession. At the time these policies were issued the partnership known as Jim Dandy Markets, Inc., was in possession of the premises, and at the time of the fire the successor, as relating to the Atlantic Store of Jim Dandy Markets, Inc., were in possession of the premises.

The Court: Is that stipulated to?

Mr. Menzies: We stipulated, your Honor, that at the inception the policies went to the partnership and that Jim Dandy Markets—

The Court: He is now asking to stipulate that they were in possession of these premises when the policies were issued.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: That I don't know, your Honor. I would have to rely on Mr. Thomas and Mr. Sadicoff.

Mr. Thomas: The facts are, as I understand them (and I think it was so recited in your proposed stipulation, Mr. Sadicoff) that the agreement, supplemental agreement, was executed July 1st and that you took inventory over the holidays, including the Fourth, and went into possession at 7:00 o'clock on the morning of the 5th when you opened the doors. [163]

Mr. Sadicoff: That is right.

Mr. Menzies: If that is the fact, I am perfectly willing to stipulate.

Mr. Thomas: Beginning the morning of the 5th of July 1945.

The Court: Very well. The stipulation will be that at the beginning of the morning of the 5th of July 1945, up to the date of the fire, Jim Dandy Markets, Inc., or their predecessor in interest, Jim Dandy partnership, were in possession continuously.

Mr. Menzies: That is satisfactory.

Mr. Sadicoff: That is right.

Now on the 19th day of March 1947, which is subsequent to the date of the fire, all amounts due under the supplementary agreement marked Exhibit C and attached to the answer of the defendant Jim Dandy Markets, Inc., to the cross-claim of E. F. Smith were paid.

The Court: What is that, up to the date of the fire?

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: That was after the fire.

The Court: You fixed some date when you started out?

Mr. Sadicoff: Will the reporter read my statement?

(The record referred to was read by the reporter as follows:

“Now on the 19th day of March 1947, which is subsequent to the date of the fire, all amounts due [164] under the supplementary agreement marked Exhibit C and attached to the answer of the defendant Jim Dandy Markets, Inc., to the cross-claim of E. F. Smith were paid.”)

Mr. Sadicoff (Continuing): Due or to become due. In other words, we paid them the sum of.

The Court: If it was all that was due, it would become due.

Mr. Sadicoff: That is what I said, due or to become due.

The Court: Do you know exactly how much money you paid?

Mr. Menzies: It shows on Exhibit D, on page 3d.

Mr. Sadicoff: \$27,300.

Mr. Menzies: It shows here in the escrow \$22,400. Now which is correct?

Mr. Davis: It doesn't make any difference.

Mr. Thomas: It might, but to get it clear, I think that amount is the amount that was paid subsequent to the fire and the difference between that and \$27,300 being the amount that was paid prior to the fire.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: That is right.

Mr. Thomas: As credited against the Atlantic store, all these stipulations going to the Atlantic store only.

The Court: Let me state the stipulation, as I understand it: that on March 19, 1947, \$22,400 was paid by whom to whom? [165]

Mr. Sadicoff: By Jim Dandy Markets, Inc., to Morrison Escrow Company, the escrow holder for the account of E. F. Smith.

The Court: In accordance with the terms of the supplemental agreement and credit applications—

Mr. Sadicoff: And that—

The Court: Just a minute—in accordance with the escrow agreement and instructions.

Mr. Sadicoff: No, in accordance with the supplementary and modified agreement and escrow instructions.

Mr. Menzies: That is satisfactory.

The Court: Is that agreeable?

Mr. Davis: That is agreeable.

Mr. Thomas: That is agreeable as to a fact. As to its materiality, we can argue that, I understand.

The Court: You just stipulate that that much money was paid on that date?

Mr. Sadicoff: And upon the payment of that amount it constituted full payment under the supplementary and modified agreement and the escrow instructions of the sum of \$27,300 due Mr. Smith from Jim Dandy Markets, Inc., with respect to the Atlantic store.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: That is something that is a matter between yourself and Smith and is no concern of the plaintiffs.

The Court: You are stipulating to the legal effect of [166] it?

Mr. Sadicoff: That is a fact, isn't it, Mr. Thomas?

Mr. Thomas: That is the legal effect, I think, the way you stated it. You paid it and whatever purpose you had or what legal effect it had, I am not going to stipulate to.

The Court: Just the statement that it was paid. You can argue later it was in compliance with the agreement.

Mr. Sadicoff: That is satisfactory.

Mr. Davis: Off the record.

(Here followed informal discussion outside the record.)

The Court: What is next?

Mr. Thomas: To round that out, that would show then the difference between that and \$27,300 would be the amount that was credited against the payment on the Atlantic market prior to the time of the fire.

Mr. Sadicoff: That is right.

The Court: What amount was that?

Mr. Menzies: It is the difference between \$27,300 and \$22,400.

Mr. Thomas: All right.

Mr. Menzies: That would be under the original agreement, your Honor.

The Court: That prior to the fire there was paid

Plaintiffs' Exhibit No. 1—(Continued)

the difference between \$27,300 and \$22,400, is that right?

Mr. Sadicoff: That is right. [167]

Mr. Davis: May I ask this, is there any controversy between Jim Dandy and Smith on the question as to whether or not the Jim Dandy Markets had up to the date of the fire fully complied with all the terms of the two contracts and the escrow instructions?

Mr. Sadicoff: There is no controversy.

Mr. Thomas: No.

Mr. Davis: They kept their payments up in full?

Mr. Sadicoff: Yes, sir. As a matter of fact, they anticipated them.

The Court: Is that stipulated to?

Mr. Thomas: Yes.

The Court: Prior to the date of the fire there was no default in the contracts?

Mr. Thomas: That was stipulated to once earlier, I believe.

Mr. Davis: Nobody signed the stipulation. You mean today?

Mr. Thomas: Yes.

Mr. Davis: I missed it then.

The Court: What is next?

Mr. Menzies: That the execution of the various documents that have been agreed to in here, with the exception of the two insurance policies issued by plaintiffs herein, took place and transpired without the knowledge or consent of the [168] two plaintiffs.

Mr. Sadicoff: We won't stipulate to that.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: Then may I inquire, what objection there is to that stipulation or what, if any, proof counsel may have that we did have knowledge?

The Court: What is the materiality of that?

Mr. Menzies: The materiality is this, your Honor, that if counsel is endeavoring to show a waiver of the conditions of the policy in so far as sole and unconditional ownership is concerned on the part of the company prior to or at the time of the execution of the contracts of insurance, that that is not admissible as a matter of law and is not material to these issues. That is why I ask for that stipulation, because there can be no waiver of the conditions prior to the execution of the contracts or prior to the fire. You can only waive the conditions after.

The Court: I see. He refuses to stipulate, so we will have to stipulate to something else.

What else do you have?

Mr. Menzies: Then we would like to know this, your Honor, upon what, if anything, he intends to rely upon that in order that the trial may be shortened and we may be in a position to meet this issue.

Mr. Sadicoff: I don't know that I am called upon to disclose by what witnesses we are going to prove that not to [169] be the fact. In the first place, I deem it absolutely immaterial anyhow. In the second place, if it is material, we can show, I am satisfied by a witness, that that is not the fact.

The Court: You expect to offer proof on the plaintiffs' case that you had no notice or knowledge?

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: That is right. It is a matter of law, your Honor.

The Court: I mean, you expect to prove that fact?

Mr. Menzies: That is correct. That is why I expect him to stipulate to those facts. If he contends that there was a waiver I think we have a right to know it and the Court has a right to know it because it will materially affect the length of the trial. As a matter of law it is not material.

The Court: Is there a provision in the policy to the effect that they are the sole owners?

Mr. Menzies: Yes, there is, your Honor.

Mr. Sadicoff: But, Judge, under the cases we don't have to be the sole and unconditional owner in that no one else has an interest. Under the cases, they are legion to the effect that under a provision such as we have in this policy that the assured must be the sole and unconditional owner. The cases hold that a conditional vendee is the sole and unconditional owner of the policy.

The Court: Of the property. [170]

Mr. Sadicoff: Of the property. There just isn't any doubt about it. Isn't that right, Mr. Davis?

Mr. Davis: I know of no case to the contrary.

Mr. Menzies: That is true if you have a general principle of law, but you don't have that here under the evidence that is here, and that is why, if counsel is contending that there was a waiver of that condition prior to the time of loss, that will materially affect the time of trial. I think the Court should

Plaintiffs' Exhibit No. 1—(Continued)

know that because I have an answer to it here that came out of this very court, that is, the Ninth Circuit.

Mr. Davis: What case is that?

Mr. Sadicoff: What case is that?

Mr. Menzies: That is your Fidelity Union Fire Insurance Co. v. Kelleher, 13 F. (2d) 745; and to the same effect is the Great American Insurance Company v. Johnson, 25 F. (2d), rehearing denied in 27 F. (2d) 71, and certiorari was denied in 49 Supreme Court 29, 278 U. S. 629, 73 L. Ed. 548.

It was held there that a breach of an unconditional and sole ownership warranty cannot be met by preliminary proof of agent's knowledge or true ownership in an action at law on the policy providing that no agent can verbally waive terms thereof.

Mr. Davis: Those cases are all tried before our case of *Smith v. Tyson*. We have to start back and pioneer again.

Mr. Sadicoff: You have to follow the State decisions [171]

Mr. Menzies: That is true, but your very State decision that came up here under a California policy, under California law.

The Court: It might have got to the Federal Court, but it is the State Court's construction of it rather than the Federal Court's construction of it.

Mr. Menzies: That is true.

Mr. Sadicoff: What State case are you referring to?

Mr. Menzies: I am referring to this first one

Plaintiffs' Exhibit No. 1—(Continued)

here that came up, this first noted case. I believe that that still is the law.

Mr. Davis: I think your general statement might be true, but not as it relates—I am arguing Mr. Sadicoff's case because it is partially mine.

The Court: If that were the law, how could anybody who is buying a house under a trust deed insure his property?

Mr. Menzies: That is because they have either a mortgage clause indorsement on it or they have what they started out to have here, a loss payable clause, and then cancel it off.

Mr. Davis: No, the reason for that, Mr. Menzies, is that a trust deed and a mortgage is different from a deed of contract.

Mr. Menzies: Furthermore there is this, that title would not pass from the conditional vendee under the facts in this case if it were a conditional sales contract until the close [172] of escrow, and there is a California case on that particular point.

Mr. Davis: I think you will find the cases hold this, and almost unanimously—

Mr. Menzies: May I finish?

Mr. Davis: Excuse me.

Mr. Menzies: This California case is a rather recent one. It is *Vierneisel v. Rhody Land Insurance Company*, 175 Pac. (2d) 63. That was decided December 12, 1946, and it holds that title did not pass until the close of escrow and that the title still vested in the vendor and it didn't abrogate the vendor's rights and that the vendee had no right

Plaintiffs' Exhibit No. 1—(Continued)

to the proceeds of that policy or any interest therein.

Mr. Davis: That was decided on the particular facts.

Mr. Sadicoff: As a matter of fact, you have a code section that holds under your uniform sales act that under a conditional sales contract the loss of the property falls upon the conditional vendee and not upon the conditional vendor.

Mr. Thomas: Let me put my oar in.

In the first place, as submitted by our cross-claim, whether this building was a part of the contract, whether it was a conditional sales contract or was not, that is a factual situation.

The Court: We are not going to argue the law here. Do you have any more stipulations? Mr. Sadicoff refused your [173] stipulation.

Mr. Menzies: That is the only thing I had.

The Court: Do you have any more stipulations that you want to ask, any of you?

Mr. Menzies: I think we should know whether we should be prepared on that issue, if there is going to be a contest on it.

The Court: Apparently his position is that it is immaterial.

Mr. Menzies: Then there will be no contest on that, as I understand it.

The Court: I suppose if you offer the evidence and he objects on the ground it is immaterial and I rule on it, I rule that it is material, then he will have to defend. But I will decide that at that time.

Mr. Menzies: No, I think it is the other way

Plaintiffs' Exhibit No. 1—(Continued)

around. I think up to the present moment that a prima facie case has been made out by the plaintiffs here in view of these stipulations and if counsel is contending that there was a waiver of that sole and unconditional ownership at the inception of the policy and prior to the loss, then it is a question of whether that is material as a matter of law, and that will materially affect the time of trial.

The Court: Do you have any other stipulations of fact?

Mr. Thomas: I can ask one, and that is about the policy [174] on the equipment in the store which was a subject matter directly of this contract, if it was carried with the loss payable clause and was paid by agreement between your people and Mr. Smith. I hadn't discussed that before but from my cross-claim I think it is material.

Mr. Davis: Is that in the written agreements?

Mr. Thomas: Yes, it is in the agreements, that there will be a policy on the equipment and that it will be carried with a loss payable clause. I understand that it was a fact that it was done and that the policy was paid by agreement with the parties, that is, both of them signed off.

Mr. Davis: Under your cross-claim it is really an action for reformation of these agreements.

Mr. Sadicoff: That this Court has no jurisdiction to entertain that too.

Mr. Davis: That is another serious point.

The Court: What are you doing here then? If they are properly in court on the other matter I

Plaintiffs' Exhibit No. 1—(Continued)

think I can entertain the jurisdiction of that matter as an incident to the entire disposition of the litigation because under the statutes and under the new rules and under the cross-claims in interpleader, if you are in court on one thing you are in court on the whole controversy. At least that is what I ruled in the matter of *Mallonee v. Fahey*.

Mr. Menzies: The Ninth Circuit held about the same in a [175] recent case.

Mr. Sadicoff: Mr. Thomas, will it be stipulated, also that at no time from and after the 5th of July 1945 to the date that the building known as the Atlantic store was destroyed by fire on January 14, 1947, at no time subsequent thereto did Smith ask, demand or receive any rents for the use or occupancy of said building or of the land upon which said building was situated, and all rents and taxes, including the taxes on the building that were due and payable under the leases covering it, were paid by Jim Dandy Markets, a partnership, or Jim Dandy Markets, Inc. ?

Mr. Thomas: That isn't correct as to the taxes. There was no separate agreement or demand for rent, I will go that far, but the taxes, that statement is not correct and I won't stipulate to it.

Mr. Sadicoff: You will stipulate though—

Mr. Thomas: There was no demand for any payment of rent or otherwise other than as provided in the agreement.

Mr. Sadicoff: And no rents were paid to him.

Mr. Thomas: Whatever rents were there called

Plaintiffs' Exhibit No. 1—(Continued)

for, and there were rents paid on the land and they were paid by Jim Dandy Markets or their predecessors. The lease itself called for rent and you were a sub-lessee—that is another document that maybe ought to be in for our cross-claim—that there was a sub-lease under the original agreement. [176]

The Court: There is still another document?

Mr. Thomas: I just remembered. For the purpose of our cross-claim there is.

The Court: Is that stipulation agreeable to you as Mr. Thomas stated it?

Mr. Sadicoff: You excepted the taxes. Otherwise my stipulation is agreed to?

Mr. Thomas: I have forgotten exactly. I restated it the way it would be satisfactory. I think you had some legal conclusions in there again.

Mr. Sadicoff: No. What I was doing, Mr. Thomas, was reading from the stipulation of facts that I had prepared.

Mr. Thomas: It had some conclusions of law in it too.

Mr. Sadicoff: Let me read it over again. That at no time from the first day of July 1945 to the date that the building known as the Atlantic store was destroyed by fire on January 14, 1947, and at no time subsequent thereto did the defendant E. F. Smith ask, demand or receive any rents for the use and occupancy of said building or the land upon which said building was situated.

Mr. Thomas: Other than as covered in the agreements. If you will put that in, I will stipulate to it.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: Will you stipulate to this, will you add further, and that the rents that were due under the two leases from and after the first day of July 1945 were paid to [177] the respective lessors named in said leases?

Mr. Thomas: I don't object to stipulating. We have covered it. It was not in default. Jim Dandy Markets or its predecessors were not in default at the time of the fire. Whatever they were obligated to do they had done.

Mr. Menzies: What about the payment of taxes? Who paid those?

Mr. Sadicoff: We paid the taxes and we paid the taxes on the building.

Mr. Thomas: We are not stipulating to it.

Mr. Sadicoff: All right.

The Court: What next?

Mr. Thomas: I didn't get an answer to my request as to the insurance on the facilities and equipment.

Mr. Sadicoff: There was a policy upon the equipment in which Jim Dandy Markets, a partnership, and subsequently Jim Dandy Markets, Inc., was named as the assured and E. F. Smith was named as his interests would appear.

Mr. Menzies: Under a loss payable clause.

Mr. Sadicoff: Under a loss payable clause.

Mr. Thomas: Which were issued in accordance with the agreement.

Mr. Davis: That is a conclusion.

The Court: Is that agreeable?

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: Yes, sir. [178]

The Court: And that the losses were paid?

Mr. Thomas: The losses were paid under that policy.

The Court: Under that policy and agreed to, accepted by everybody, is that right?

Mr. Sadicoff: Wait a minute. That is not true. The losses were payable by the insurance company.

Mr. Menzies: In accordance with their contract.

Mr. Sadicoff: In accordance with their contract.

Mr. Thomas: Which would mean of course that they both signed off if they were both on there. All right.

Mr. Sadicoff: As a matter of fact, Smith didn't sign anything.

Mr. Menzies: He would have to sign the draft.

Mr. Sadicoff: He signed the draft, that is right.

Mr. Davis: Who got the money?

Mr. Sadicoff: We got the money and paid it to Smith.

Mr. Thomas: Do you know the amount of the policy and the amount that was collected?

Mr. Sadicoff: I think I got a check for about \$75,000.

The Court: Is that material?

Mr. Sadicoff: I don't think it is material.

Mr. Davis: I don't see where it is material.

The Court: Let us omit it then.

Mr. Menzies: The only part material is the loss payable clause. [179]

The Court: What next?

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: That following March 19, 1947 the Morrison Escrow Company delivered to Jim Dandy Markets, Inc., the following documents that are attached to the answer of the defendant Jim Dandy Markets, Inc., to the cross-claim of defendant E. F. Smith: Exhibit A, Exhibit B, Exhibit C, Exhibit E and Exhibit F. I left out the escrow instructions.

Mr. Thomas: Did that include the agreement?

The Court: Supplemental agreement.

Mr. Thomas: Was that delivered on that date?

Mr. Sadicoff: Yes.

Mr. Thomas: I will have to accept your statement that that is the fact. I don't know it. I don't question it. That was on the 19th of March at the time you paid the Atlantic store only?

Mr. Sadicoff: No, I think you are right. I want to amend that. Not Exhibit C. That is the supplementary and modified agreement. But the other exhibits that I have recited.

Mr. Thomas: The exhibits you have described are the two leases and the assignment.

Mr. Sadicoff: Two leases, assignment and bill of sale.

Mr. Thomas: All right. So stipulated.

The Court: Very well.

Mr. Thomas: Again the materiality of it is a legal question [180] to be argued when we brief it.

Mr. Sadicoff: That on the 30th day of July 1947 any sums unpaid—strike that out.

That on the 30th day of July 1947 the balance due on the sum of \$225,000, as required to be paid

Plaintiffs' Exhibit No. 1—(Continued)

by the supplementary and modified agreement, was paid to the Morrison Escrow Company for and on behalf of Smith and a few days thereafter Morrison Escrow Company paid such amount to E. F. Smith.

Mr. Thomas: I understand he has been paid but I haven't gone into that. I didn't see where it would fit into this case. I have no objection to accepting your figures as to the date or the figures.

The Court: You stipulate to it but object to its materiality?

Mr. Thomas: Yes.

The Court: Very well. It is so stipulated.

Is that all? Do you have anything more?

Mr. Sadicoff: I don't think so.

The Court: Do you have any more requests for stipulation?

Mr. Menzies: Yes.

Mr. Thomas: Could I check the date that that was paid?

Mr. Sadicoff: July 30, 1947.

Mr. Thomas: That was a couple of weeks after the payment on the Atlantic market? [181]

Mr. Sadicoff: The Atlantic market was made in March.

Mr. Thomas: That is what I was trying to get straight.

Mr. Sadicoff: I have a letter to the Morrison Escrow Company on it.

Mr. Thomas: Let it go. I don't see the materiality except it did come some time after the pay-

Plaintiffs' Exhibit No. 1—(Continued)
ment on the Atlantic store. They were not at all together. I am willing to let it go that way.

Mr. Sadicoff: Supposing, Mr. Thomas, that we have that stipulation subject to your right to withdraw the stipulation if you find out it is not the fact?

The Court: All right.

Mr. Thomas: If we found we made a mistake there wouldn't be any question of getting it changed.

The Court: You have no requests for stipulation, Mr. Thomas?

Mr. Thomas: No.

The Court: And you, Mr. Davis?

Mr. Davis: No.

Mr. Menzies: That is all of the documents, save and except the two insurance policies that have been offered and received in evidence here; that the two plaintiffs had no knowledge of their execution and were not parties thereto.

Mr. Sadicoff: We will not stipulate to that.

The Court: That is the one you started out with.

Mr. Menzies: They speak for themselves anyway.

The Court: He says he will not stipulate to it.

Do you have any other stipulation?

Mr. Menzies: No.

The Court: Very well. Now you have all those stipulations out of the way.

Mr. Sadicoff: When do we go to trial?

The Court: Do you expect to make a motion for a summary judgment?

Mr. Menzies: I believe I will. I want the tran-

Plaintiffs' Exhibit No. 1—(Continued)

script written up, and I would like copies of these documents. Then I will read it over and endeavor to make a motion for summary judgment if we can.

The Court: I will give you a trial date now anyhow. January 27th for trial. How long will it take? Two days?

Mr. Thomas: Two days, I guess. We can finish in one.

Mr. Davis: Don't you think we ought to discuss the *modus operandi* a little bit? Mr. Thomas filed a cross-claim for reformation of all these contracts. Mr. Sadicoff denies his reformation. The insurance company is kind of on the outside looking in.

Mr. Sadicoff: It will take longer than that. You had better figure four days.

Now at the time of trial I suppose that the cross-claim for reformation should be tried first. [183]

Mr. Menzies: I believe that is correct.

Mr. Thomas: If we really brief this motion for judgment on the pleadings, if he makes one, if Mr. Menzies carries through and makes one, and we brief that it may simplify the issues very much because of clarifying the legal issues and the facts that are on these documents.

Mr. Menzies: Better give some thought to this, that it may very well complicate your situation if your reformation is tried first. That may dispose of the whole matter.

Mr. Thomas: Yes, it may save a lot of arguments on the law. That is true.

Mr. Menzies: That is correct.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Davis: You are going to decide whether you can make a motion for summary judgment? You are going to be pretty good if you can do it, but it is worth trying. Maybe you can get rid of it.

The Court: I couldn't give you a summary judgment if I have to decide the reformation first.

Mr. Menzies: What would be the use of making that until after the determination of the question of reformation? Then you could make it.

The Court: I would not want to take this two bites at a time. I would like to have all the evidence to be put in and to be done at the time of trial.

Mr. Thomas: I am willing to lead off, that is, on the [184] question of my cross bill, and then after that evidence is in we can take up what is left.

Mr. Menzies: Could we agree on this, in so far as the plaintiffs are concerned, that the prima facie case has been established in the light of the stipulation here? That would save considerable time.

Mr. Davis: A prima facie case for what?

Mr. Sadicoff: Prima facie case for what?

Mr. Menzies: That a controversy does exist.

The Court: I will set it for trial on that date anyhow. I think Mr. Menzies' stipulation that a controversy exists, that is, a prime facie case, or just that a controversy exists, that that puts Mr. Thomas in court, because if no controversy exists you cannot intervene.

Mr. Thomas: That is right. That is one advantage I thought there would be if you wanted to make that motion. What I didn't want to do is try

Plaintiffs' Exhibit No. 1—(Continued)

all this and get a decision that there wasn't any controversy or that he wasn't in court for some reason that didn't settle the things that I had been trying.

The Court: Is there an issue raised by anybody's answer that there is no controversy?

Mr. Davis: Yes, I have raised it. There is no controversy between me and the other insurance companies, which is the only issue that I have had so far. [185]

Mr. Sadicoff: There is no controversy between the plaintiffs and us in connection with this reformation. There couldn't be.

The Court: In connection with the issues raised in his complaint?

Mr. Menzies: That is right.

Mr. Thomas: Yes. I don't follow that because a decision on this reformation would certainly rebound for him or against him very directly and distinctly.

Mr. Sadicoff: He couldn't bring an action to reform.

Mr. Davis: However, isn't it not so much a question of reformation with the Court but as to where the true facts lie?

Mr. Sadicoff: No, because of the fact that the documents as now in existence, in my opinion—and I think in Mr. Thomas' opinion because otherwise he wouldn't have brought an action for reformation—that this assignment conveys to us this building.

The Court: What I am trying to get at now is

Plaintiffs' Exhibit No. 1—(Continued)

his complaint. He comes in and says that a controversy has arisen between you and Smith as to who is to get the money, isn't that right?

Mr. Menzies: Yes.

Mr. Sadicoff: He says he has no controversy with Smith on this policy.

Mr. Menzies: We are trying to preclude Smith coming in [186] here and saying that we are trustees for his use and benefit of this money.

The Court: What you are saying in your complaint is that either a controversy has arisen or may arise?

Mr. Menzies: Yes.

The Court: That gives jurisdiction in an interpleader suit.

Mr. Sadicoff: This is not an interpleader suit. That is the difficulty.

Mr. Menzies: It is for declaratory relief. In other words, a controversy exists and there is a diversity of citizenship between all of the parties plaintiff and all the parties defendant. We don't want to be placed in the position here that we might pay out money, if we have to pay it out to Jim Dandy, and then have Smith come in and say, well, we had an interest in that policy.

The Court: If that is the case that raises the question as to whether or not the Court has jurisdiction in the cross-claim of Smith.

Mr. Sadicoff: Exactly.

The Court: There isn't any diversity there.

Mr. Sadicoff: Certainly not.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: That is true, but it doesn't have to be as between those two.

The Court: If it were a suit in interpleader or a case [187] in the nature of an equity action, then I would have jurisdiction, but this is not.

Mr. Menzies: Declaratory relief has been held to be an equity action, your Honor.

The Court: By whom?

Mr. Menzies: By our Appellate Courts. That was our Appellate Courts. It sounds in equity because they will review all of the facts on appeal.

The Court: You mean the Ninth Circuit? They review all facts on appeal anyhow. They will go in and test the credibility of those facts. They have the right to do that.

Mr. Menzies: It sound in equity. I have that very question up before the Ninth Circuit now.

Mr. Thomas: Is that essential? I don't think it is essential to keep jurisdiction. The point is, he doesn't know whether he has a liability or not because of the controversy existing among us local people. Isn't that it essentially?

The Court: That is right. He may be in court but you may not be in court.

Mr. Sadicoff: That is right.

Mr. Thomas: But I have to be in court to settle his liability because he can't settle with Mr. Sadicoff the controversy of my reformation without me.

Mr. Sadicoff: The trouble is with it, under the cases— [188]

The Court: If that were a suit in interpleader

Plaintiffs' Exhibit No. 1—(Continued)
and you deposited the money in court, then I would have jurisdiction.

Mr. Thomas: But you have anyway.

The Court: I do not think I have under the declaratory relief statute.

Mr. Menzies: I think you have. I think the powers are broad enough there, if any controversy arises out of that transaction that the Court has the power to hear, try and determine.

Mr. Sadicoff: There must be a controversy between the plaintiffs and the defendants, but that is not a controversy between us.

The Court: Have you raised that by a motion to dismiss?

Mr. Sadicoff: No, I have raised it by pleading that the Court has no jurisdiction.

The Court: You have?

Mr. Sadicoff: Yes, sir.

The Court: Well, let me see what the rule says:

“When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the Court as to both service of process and venue and can be made parties without depriving the Court of jurisdiction of the parties before it, the [189] Court shall order them summoned to appear in the action.”

Say that Smith was not a party here. Yours is a cross-complaint in intervention, isn't it?

Mr. Sadicoff: No.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Thomas: No.

Mr. Sadicoff: No intervention and this is not an interpleader.

Mr. Menzies: This is for declaratory relief.

The Court: He isn't asking declaratory relief.

Mr. Thomas: I am asking equity reformation. I am in equity.

Mr. Sadicoff: And he is a resident of California and we are residents of California.

Mr. Thomas: Before drawing these pleadings, there was a very recent case—

The Court: Why do you not make it a suit in interpleader?

Mr. Sadicoff: He wants to walk out and not pay anybody.

Mr. Menzies: We want to know. If these people are not the sole—

The Court: You do not admit any liability?

Mr. Menzies: No, we don't admit liability. We are coming in here to have our liability, if any, determined by the Court as to Jim Dandy, and if Smith has any claim on that we want to know about that. [190]

The Court: I think you perhaps had better raise that question by motion to dismiss so that I can dispose of it before the date of the trial.

Mr. Thomas: That was my point a while ago. I didn't want to try this if we were going to be thrown out on the trial. Of course you could do that if you found the facts that way.

The Court: I think it is a question of law that

Plaintiffs' Exhibit No. 1—(Continued)

can be decided before the trial and ought to be raised in a formal way because you expect to raise the question at the trial.

Mr. Sadicoff: Certainly.

The Court: You cannot confer jurisdiction anyhow if you do not raise it.

Mr. Davis: I am just a party with nobody asking anything against me.

Mr. Thomas: Mr. Davis raised the jurisdiction in his answer too.

Mr. Sadicoff: That is right.

The Court: I think those questions ought to be raised by motion so that they can be decided.

Mr. Davis: I raised them in the answer.

Mr. Thomas: Before we go to putting all this evidence in.

The Court: Before you get ready for trial too. Then it is not a matter that you can decide off the cuff. It will [191] probably take quite a bit of research.

Mr. Davis: I said when I first came up here that I would like to try it here, but I would like to have a trial, not a pleasant meeting.

The Court: Suppose you gentlemen raise that point on your motion to dismiss, each of you?

Mr. Davis: We have. I have raised it.

Mr. Sadicoff: The judge means by a specific motion, by a formal specific motion.

The Court: If you have raised it I will set it down for argument now.

Mr. Sadicoff: Don't do it right now. I am just

Plaintiffs' Exhibit No. 1—(Continued)

snowed under and I don't know whether I am afoot or horseback in my office, and I guess a lot of the other fellows are the same way.

Mr. Thomas: Could I add something more here on this?

The Court: You both raised it in your answer. I will set down the question of jurisdiction raised in the answer of Fireman's Fund and the answer of Jim Dandy.

Mr. Thomas: I think Mr. Menzies ought to make his motion to dismiss on the pleadings because I found this condition in my review before pleading this on the jurisdiction, that if you are going to decide that he doesn't have a claim simply on the pleadings or whatnot as against his assured, it will affect the jurisdiction of the rest of these things, [192] whereas if that question is left open and has to be decided that way in the end it redounds against the jurisdiction. It seems to me that he ought to make that motion.

Mr. Davis: You mean a summary judgment, not a motion to dismiss?

Mr. Thomas: A judgment on the pleadings, or whatever you want to call it.

The Court: Here is the point: Fireman's Fund have raised the question of jurisdiction in their answer, and so has Jim Dandy in their answer to the cross-claim of Smith. So I can set those issues down for a trial on the law, on the motion to dismiss.

Mr. Thomas: Yes.

The Court: I can set it for next Monday, the

Plaintiffs' Exhibit No. 1—(Continued)
following Monday, or the following Monday. Monday is December 22nd.

Mr. Sadicoff: We are going to have the motion to dismiss?

The Court: Of Fireman's Fund and Jim Dandy Markets.

Mr. Menzies: Not Jim Dandy Markets.

The Court: Jim Dandy Markets' motion to dismiss Smith's cross-claim.

Mr. Menzies: December 22nd?

The Court: Yes, at 10:00 o'clock.

Mr. Menzies: All right.

Mr. Sadicoff: It won't be necessary to give formal [193] notice?

Mr. Thomas: Just motions on the pleadings?

The Court: It is on the question of jurisdiction. It will only be a question of law.

Mr. Thomas: All of us will have our briefs in the same day?

The Court: You ought to have your briefs in five days in advance.

Mr. Davis: You haven't filed any cross-complaint against the Fireman's Fund?

Mr. Thomas: No.

Mr. Davis: I haven't any issue here.

The Court: You have raised the question on a motion to dismiss against the plaintiff.

Mr. Davis: Yes, but that wouldn't go to jurisdiction; that would go to stating a cause of action because, after all, we do have the requisite jurisdictional ground. We are citizens of different states. I was thinking that Mr. Thomas had filed a cross-

Plaintiffs' Exhibit No. 1—(Continued)

complaint. Nobody sued me.

Mr. Sadicoff: You are not waiving, but are you asserting your defense that this Court has no jurisdiction to entertain this action?

Mr. Davis: Such as it is against us, but he had stated no cause of action against us. It would have to be between Smith and the other fellow. [194]

The Court: I think there is some new law on that.

Mr. Thomas: Are we going to get briefs from the moving parties before we write one?

The Court: You are not going to move, you are out?

Mr. Davis: Yes. I didn't make a motion here. I was going to make a motion if Mr. Sadicoff filed a cross-complaint against me, but he didn't.

The Court: Your brief will be due December 15th, and Mr. Thomas' brief will be due—

Mr. Menzies: I think we ought to have the time split between us, your Honor.

The Court: Your brief can be filed then in two weeks or three? Your brief will be due December 8th.

Mr. Sadicoff: All right.

The Court: And reply briefs will be due the 15th.

Mr. Davis: That is on your motion for summary judgment?

Mr. Menzies: No, that is their motion to dismiss.

Mr. Davis: Between Mr. Thomas and Mr. Sadicoff?

The Court: That is right.

Mr. Thomas: But he will serve it on everybody. Everybody will be in on it because it certainly

Plaintiffs' Exhibit No. 1—(Continued)
affects everybody.

Mr. Sadicoff: Then as I undertsand it, you are not going to make a motion to dismiss for lack of jurisdiction?

Mr. Davis: I haven't any grounds yet.

Mr. Sadicoff: All right. [195]

The Court: Very well.

(Whereupon, at 4:20 o'clock p.m., the pre-trial conference was adjourned.) [196]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 1st day of December, A. D., 1947.

/s/ AGNAR WAHLBERG,
Official Reporter. [197]

[Endorsed]: Filed June 17, 1948.

PLAINTIFFS' EXHIBIT No. 11

Nelson Gary, Insurance Adjuster
Los Angeles, Calif.

ADJUSTER'S AGREEMENT

Whereas, Jim Dandy Markets, Inc., claims loss and damage by a fire alleged to have occurred on the 14th day of January, 1947, to certain property insured under Policy No. F 321452 issued by the Central Manufacturers Mutual and Policy No. 3170 issued by the Indiana Lumbermens Mutual Insurance Companies of Van Wert, Ohio, and Indianapolis, Indiana, by their Agency at Los Angeles, California, to Jim Dandy Markets, Assured, and

Whereas, Said Jim Dandy Markets, Inc., and the Insurance Companies, issuing said policies are mutually desirous of determining and agreeing upon the amount of such loss and damage, without regard to the liability of the Companies, and without the relinquishment or surrender on the part of said Jim Dandy Markets, Inc., of any of their rights in the premises, and without the waiver or surrender by said Insurance Companies of any of its rights or defenses or of formal proofs of loss or of any of the conditions or requirements of said policies.

Now, therefore, in consideration of the trouble and expense incident to such investigation and determination which have been incurred in the premises of said Jim Dandy Markets, Inc., and said Insurance Companies, respectively, and by way of a compromise, it is hereby stipulated and agreed that the sound cash value of said insured property, im-

Plaintiffs' Exhibit No. 11—(Continued)

mediately preceding the loss, and the total loss and damage thereto, are as follows:

1. Composition roof frame stucco open air market building—situate 6801 Atlantic Avenue, Bell, California: Sound value, \$32,476.92; loss and damage, \$32,476.92.

And said sums as above set forth and agreed upon are hereby irrevocably accepted by the parties hereto as binding and conclusive; but it is expressly and specifically understood and agreed, by and between the parties hereto, that the question of liability has not entered into and is not in any manner covered or affected by this agreement, and said Jim Dandy Markets, Inc., shall not be held or deemed to have relinquished or surrendered any rights under said policies, beyond being bound by said sound value and loss and damage as herein set forth and agreed upon; and said Insurance Companies shall not be held or deemed to have waived any of its rights in the premises, nor waived formal proofs of loss, nor waived any of the conditions or requirements of the policies, beyond being bound by said sound value and the loss and damage as herein determined and agreed upon.

The total insurance covering all or any portion of the insured property at the time of the loss was \$41,700.00, as follows:

No. F 321452, Central Manufacturers Mutual Insurance Company, \$12,500.00.

No. 3170, Indiana Lumbermens Mutuals, \$12,500.00.

Plaintiffs' Exhibit No. 11—(Continued)

We are informed that there is a policy number A 959495 in the Firemens Fund Insurance Company and E. F. Smith is the named assured therein and said policy is in the sum of \$16,700.00 and covers on the above described premises.

In Testimony Whereof, The said parties have hereunto set their hands, this 9th day of April, 1947.

CENTRAL MANUFACTURERS MUTUAL
INSURANCE CO.

INDIANA LUMBERMENS MUTUAL
INSURANCE CO.,

By NELSON GARY,
Adjusting Representative.

Signed and delivered in the presence of

(Seal) /s/ HARRY G. SADICOFF,
 /s/ EDWARD I. HARRIS,
 Jim Dandy Markets, Inc.

By /s/ LESTER WEISZ,
 Secretary [198]

DEFENDANT'S EXHIBIT "A"

SUB-LEASE

This Indenture, made this 1st day of July, 1945, by and between E. F. Smith, party of the first part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership, doing business under the name and

Defendant's Exhibit "A"—(Continued)
style of Jim Dandy Markets, parties of the second part:

Witnesseth

That, Whereas, the parties hereto have heretofore entered into a written agreement dated July 1, 1945, by one of the terms of which the party of the first part did agree with the parties of the second part to sub-lease certain properties in said agreement designated as Atlantic Store, and

Whereas, the party of the first part in compliance with said agreement does hereby sub-lease the hereinafter described property to the parties of the second part, and

Whereas, said property occupied by said store is owned by two different parties, and

Whereas, by indenture of leases dated February 1, 1942, by and between Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, deceased, and the party of the first part herein named, certain lands therein particularly described were demised to the party of the first part herein for a term of five (5) years from August 1, 1942, at the rental therein set forth. Under the terms of said lease executed by said administrator and Ethel Williams Hartley and Sarah Muriel Wellings, an option was granted to said party of the first part herein to February 1, 1952, which option the party of the first part herein will exercise within a reasonable time after the execution of this sub-lease, and

Whereas, Chas. E. Kindig and Daisy Kindig, the second owners of the property now occupied by the

Defendant's Exhibit "A"—(Continued)

Atlantic store, have entered into an agreement or lease with the party of the first part, [199] herein, said lease being dated September 29, 1941, for a term of five (5) years from August 1, 1942, to and including August 1, 1947; said lease contains an option to extend said lease to August 1, 1952, at the rent in said lease stated, and the party of the first part shall, within a reasonable time exercise said option so as to extend said lease to August 1, 1952, and

Whereas, the party of the first part has agreed with the parties of the second part to make to them an underlease or sublease of said premises upon the exact terms therein expressed, including the extension of said lease, a copy of said original leases being attached hereto, marked Exhibit "A" and Exhibit "B" and by this reference made a part hereof, and

Whereas, under the terms of said agreement heretofore executed and referred to herein, the party of the first part agrees to enter into a lease for a period of ten (10) years on all buildings now on said property and all store fixtures and equipment, including office fixtures, now owned by the party of the first part and used in the conduct of his business, and

Whereas, the party of the first part has agreed to assign all assignable licenses issued by the State of California, or any political subdivision thereof, to the parties of the second part without compensation, and

Defendant's Exhibit "A"—(Continued)

Whereas, the party of the first part has granted to the parties of the second part an option to purchase all fixtures, equipment and good will of the business of the party of the first part, and

Whereas, the parties of the second part have deposited with the party of the first part an amount of money set forth in said executed agreement herein referred to, as advance payment on the obligations incurred by the parties of the second part in said executed agreement, as security for the faithful performance of the [200] obligations therein set forth to be performed by the parties of the second part, including the obligation to pay rent on all of the leases therein referred to:

Now, Therefore, This Indenture Witnesseth:

1. That in pursuance to said agreement and in consideration of the promises and conditions set forth in said agreement herein referred to, executed by the parties hereto on July 1, 1945, and the promises and agreements herein contained, the party of the first part does hereby demise unto the parties of the second part, all of the premises comprised in and expressed to be demised by the parties in the hereto attached original leases, To Have and to Hold said premises unto the parties of the second part for the full unexpired term of said leases, including the time referred to in the option thereon. This sub-lease is subject to a written sub-lease heretofore entered into by the party of the first part as lessor, said written sub-lease covering certain portions of said store in said sub-lease described for the sale of

Defendant's Exhibit "A"—(Continued)

fruit and vegetables, said sub-lease expiring March 1, 1946, the rental on said sub-lease being \$300.00 per month, payable to the party of the first part, and including janitor, water, light and refrigeration services; the party of the first part shall assign said sub-lease and all his interest therein to the parties of the second part.

2. The parties of the second part hereby covenant and agree with the party of the first part, that they, the parties of the second part, will pay the monthly rental set forth in said original leases on the date and in the manner therein set forth, and further agree to carry out all of the covenants and agreements contained in said original leases to be performed on the part of [201] the party of the first part, and shall not call upon the party of the first part for any repairs whatsoever in reference to the real property in said original leases described, or any of the buildings erected thereon now owned by the party of the first part, Provided Always that on the breach of any of the covenants by the parties of the second part contained in the original leases or herein contained, the party of the first part may re-enter upon said premises and immediately thereon said sub-lease shall absolutely determine, and the party of the first part hereby covenants with the parties of the second part that they, performing all of the covenants of the original leases and this sub-lease by the parties of the second part herein contained, may quietly hold and enjoy said premises during said term or any extension or renewal of said

Defendant's Exhibit "A"—(Continued)

original leases, for a period not exceeding ten (10) years, without interruption by the party of the first part or any person claiming through him, and further that he, the party of the first part, will, during the term hereby granted, duly pay said monthly rental in said original leases reserved and will at all times keep the parties of the second part indemnified against all actions, expenses, claims and demands on account of the non-payment of the rent, or any part thereof.

3. It Is Understood and Agreed by and between the parties hereto, that the party of the first part and the parties of the second part do hereby affirm and agree to comply with the terms and conditions set forth in Paragraph 5, page 6, of the original agreement dated July 1, 1945, and executed by the parties hereto, in reference to an extension or the securing of a new lease covering the premises described in the attached original leases.

4. It Is Further Understood and Agreed by and between the parties hereto that the party of the first part is the owner [202] of the fixtures and equipment now in said store, and an inventory thereof is attached hereto, marked Exhibit "C", and made a part hereof, and the parties of the second part have agreed to lease said fixtures and equipment, which are generally referred to in paragraph 3 of said executed original agreement, and it is the desire of the parties hereto to segregate said fixtures and equipment so that the proper charge may be made to each store, as this sub-lease covers only one store

Defendant's Exhibit "A"—(Continued)

out of the eight (8) to be leased by the parties of the second part from the party of the first part, and the parties of the second part hereby agree with the parties of the first part that in addition to the rent set forth in said original leases, the parties of the second part will pay to the party of the first part as rent for the fixtures and equipment now in said store, the sum of Two Hundred Dollars (\$200.00) per month, payable monthly during the term of their occupancy of said store by virtue of this sublease, or any extension or renewal thereof, not to exceed the period of ten (10) years, but it is understood, however, that the parties of the second part shall have the right and privilege which was granted in the original executed agreement to remove or exchange any of the fixtures or equipment in said store, by replacing same with other fixtures or equipment of at least equal market value, all of said replacements to become the property of the party of the first part, and said parties of the second part will keep all of said fixtures, equipment and building in good repair.

5. It Is Further Understood and Agreed that the parties of the second part, in compliance with paragraph 12 of the executed agreement, have deposited the sum of money therein set forth with the party of the first part, said money so deposited under the terms of said executed agreement was for advance payment and security for the faithful performance of all of the obligations [203] of the parties of the second part, set forth in said executed agreement,

Defendant's Exhibit "A"—(Continued)

including the payment of rental obligations on the part of the parties of the second part. This sublease, or any renewal or extension thereof, is to be considered a part of the rental obligations of the leases therein referred to.

6. It Is Further Understood and Agreed by and between the parties hereto that the party of the first part shall keep all fixtures and equipment owned by him in said store insured and shall pay all taxes which may become due thereon, and in the event fire shall wholly or partially destroy said fixtures, and equipment, and the parties of the second part desire to continue business in said store, the party of the first part agrees to renew said fixtures and equipment to the extent of the insurance collected thereon due to said fire.

7. It Is Mutually Understood and Agreed by and between the parties hereto that the party of the first part has assigned to the parties of the second part all assignable licenses issued by the State of California, or any political sub-division thereof, to do business upon the within-referred to property, without compensation.

8. It Is Further Understood and Agreed by and between the parties hereto that in the event the parties of the second part do not exercise the option to purchase the fixtures and equipment herein referred to at the time set forth in the executed agreement herein referred to, or the party of the first part is unable to secure any extension or renewal of the original leases herein referred to, which

Defendant's Exhibit "A"—(Continued)

is satisfactory to the parties of the second part, or this lease is terminated for any other reason whatsoever, the parties of the second part shall surrender to the party of the first part the property herein leased, together with the fixtures and equipment, in as good conditions as [204] the same now are, reasonable wear and damage by the elements excepted, and shall assign without compensation to the party of the first part all assignable licenses issued by the State of California, or any political sub-division thereof to the parties of the second part, required in the conduct of the whole or any part of the business then conducted by said parties of the second part on the property herein leased.

9. It Is Further Understood and Agreed by and between the parties hereto that the parties of the second part shall not assign this lease without the written consent of the party of the first part had and obtained.

In Witness Whereof, the parties hereto have hereunto subscribed their names the day and year first above written.

/s/ ~~E. F. SMITH,~~

Party of the first part.

.....
.....
.....
.....

A co-partnership doing business under the name and style of Jim Dandy Markets, Parties of the second part. [205]

PLAINTIFFS' EXHIBIT No. 12

January 20th, 1948—Copy of letter dated as below. Escrow No. 7559-E.

Jim Dandy Markets, Inc.
8451 Crenshaw Boulevard
Inglewood, California

March 20th, 1947

Morrison Escrow Company
2640 Zoe Avenue
Huntington Park, California

Re: Escrow between Jim Dandy Markets and
E. F. Smith. Store at 6801 Atlantic
Blvd., Bell, California.

Gentlemen:

In connection with the above escrow with you, there is due Mr. E. F. Smith, in connection with the market at 6801 Atlantic Boulevard, the sum of \$21,700.00.

As you doubtless know, and if not you are advised, all rights of Jim Dandy Markets, a co-partnership, under the so-called Supplementary and Modified Agreement dated June 12, 1946, between E. F. Smith and Jim Dandy Markets, a co-partnership, respecting the market at 6801 Atlantic Boulevard, Bell, have been transferred to Jim Dandy Markets, Inc.

We enclose herewith our certified check No. B2268, drawn on Bank of America National Trust & Savings Association, Inglewood Branch, in the

Plaintiffs' Exhibit No. 12—(Continued)

sum of \$1700.00, which certified check is payable to your order. We also enclose herewith Draft No. 21290 dated March 19, 1947, payable to the order of Jim Dandy Markets, Incorporated, and E. F. Smith, in the sum of \$20,000.00. Said Draft is signed by the Insurance Managers Incorporated, and drawn on Corroon & Reynolds, Inc., and payable through the Market-New Montgomery Office of the Bank of America National Trust and Savings Association, San Francisco, California. We have endorsed said Draft in Blank, and you may obtain the endorsement thereon of Mr. E. F. Smith and deposit the same in your account. When said Draft has cleared, you may pay to Mr. Smith the sum of \$21,700.00 represented by the above described Draft and Certified Check, or, if Mr. Smith so desires, you may issue your check to him for the sum of \$1,700.00 and deliver the enclosed Draft for \$20,000.00 to him and he can endorse the same and collect the proceeds. Said Draft is in payment by the Merchants and Manufacturers Insurance Company, under its policy No. 5-26489 covering insurance on fixtures at 6801 Atlantic Boulevard which were destroyed by fire on January 14, 1947, and the Draft is made payable to us and to E. F. Smith because of an insurable interest that Mr. Smith might have had in the fixtures so destroyed.

You are not to pay to Mr. Smith the said sum of \$21,700.00, under any circumstances, or deliver \$1700.00 and the aforesaid Draft to Mr. Smith un-

Plaintiffs' Exhibit No. 12—(Continued)

less you forward to us all of the documents to which we are entitled in connection with the escrow affecting the market at 6801 Atlantic Boulevard, and unless you particularly forward to us the following:

1. Assignment of Lease dated June 27, 1946, signed by E. F. Smith, which Lease assigns the two leases that Mr. Smith had upon the so-called Atlantic Store.

2. The Bill of Sale executed by Mr. E. F. Smith and dated June 27, 1946, affecting the fixtures, etc., at said Atlantic Store.

3. The Lease dated February 1, 1942, between Thomas A. McLanaghan, as Administrator of the Estate of E. T. Williams, Dec'd, Lessor and E. F. Smith, Lessee.

4. Lease dated September 19, 1941, between Charles E. Kindig and Daisy Kindig, Lessors and E. F. Smith, Lessee.

5. Any other papers, documents and instruments which you hold in Escrow relating particularly to the so-called Atlantic Store at 6801 Atlantic Blvd., Bell, California.

Your early attention to this matter will be appreciated. Please acknowledge receipt hereof.

JIM DANDY MARKETS, INC.,

By CHARLES SCHUSTER,
President.

Enclosures:
CS/mc

Registered mail.

[206]

DEFENDANT'S EXHIBIT "B"

INVENTORY.....Page.....

Sheet No..... Priced by.....

Called by.....Department.....Extended by.....

Entered by Grocery Location Dept. Examined by.....

Check	Quantity	Description	Price	Unit	Extensions
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	1	Front Awning			
	62	Awning Lights			
	76	Ceiling Lights with Globes & Reflectors			
	1	Set West Wire Iron Gates			
	2	Check Stands			
	3	Basket Racks			
	1	Nat Cash Register No. S537256GG			
	1	Nat Cash Register No. 3218809			
	1	Nat Cash Register No. 3315148			
	1	Nat Cash Register No. 3315149			
	3	Turnstiles			
	2	Dollies (For empty bottles)			
	1	Detectogram Scale			
	14	Grocery Stands			
	1	Bread Table			
	2½	Walls of Shelving			
	1	7 Door Reach in Ice Box			
	1	5 Shelf Hardware Rack			
	1	5 Shelf Candy Rack			
	1	Cake Table			
	12	Buggies			
	43	Buggy Baskets (Wire)			
	2	Buggy Baskets (Straw)			

Amount Forward

[207]

Defendant's Exhibit "B"—(Continued)

INVENTORY.....Page.....

Sheet No..... Priced by.....

Called by.....Department.....Extended by.....

Entered by.....Location.....Examined by.....

Check	Quantity	Description	Price	Unit	Extensions
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Grocery Dept Back Room

	2	Hand Trucks			
	4	Dollies			
	1	Burroughs Adding Machine No. 9-1157182			
	1	Desk Money Chest			
	1	Floor Safe			
	1	Roll Paper Rack			
	1	Gum Tape Machine			
	1	Steel Lined Trash Bin			

Amount Forward [208]

INVENTORY.....Page.....

Sheet No..... Priced by.....

Called by.....Department.....Extended by.....

Entered by Delic Location Dept Examined by.....

Check	Quantity	Description	Price	Unit	Extensions
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	1	Set Display Cases			
	1	Rail Light (17 Globes & Reflectors)			
	2	Ceiling Fans			
	1	Std Computing Scale No. 434226			
	1	Std Computing Scale No. 434225			
	1	Std Computing Scale No. 444223			
	3	Gum Tape Machine			
	3	Roll Paper Racks			
	1	Nat Cash Reg (No. not decipherable)			
	1	National Slicer No. 46441			
	1	Wall of Shelving (4 Shelves & Back Bar)			
	3	Knives			
	1	Steel Sharpner			
	1	Wash Sink			
	49	Pans Assorted			
	1	Coca-Cola Beveredge Cooler			
	1	Ice Box & Shelving			
	1	Frigidaire Compressor Model A5331			

Amount Forward [209]

Defendant's Exhibit "B"—(Continued)

INVENTORY.....Page.....
 Sheet No..... Priced by.....
 Called by.....Department.....Extended by.....
 Entered by.....Location.....Examined by.....

Check	Quantity	Description	Price	Unit	Extensions
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Do Nut Dept.
 1 Do-nut Display Case & Housing
 20 Pans—enamel
 9 Assorted Dipping Pans
 16 Wire Trays
 3 Wire Pans
 1 Do-nut Machine Model DD No. 6451
 1 Electric Fan
 1 Nat Cash Register No. S42108966
 1 Jacobs Scale
 1 Cast Iron Mixing Bowl

Amount Forward [210]

INVENTORY.....Page.....
 Sheet No..... Priced by..... 6
 Called by.....Department.....Extended by..... 30
 Entered by Bell Location Meat Dept Examined by.... 44

Check	Quantity	Description	Price	Unit	Extensions
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1 Set Meat Cases
 1 Rail Light (32 Globes & Reflectors)
 6 Ceiling Fans
 1 Std Computing Scale No. 392255
 1 Std Computing Scale No. 391088
 1 Std Computing Scale No. 392252
 1 Std Computing Scale No. 390648
 1 Std Computing Scale No. 387277
 1 Std Computing Scale No. 392256
 1 Std Computing Scale No. 392254
 1 Std Computing Scale No. 392257
 5 Gum Tape Machines
 11 Roll Paper Racks
 6 Meat Blocks
 1 Fish Block
 1 Nat Cash Register No. 3277859
 1 Nat Cash Register No. 3277858
 15 Assorted Pans
 Turkey Puller

Amount Forward [211]

Defendant's Exhibit "B"—(Continued)

INVENTORY.....Page.....

Sheet No..... Priced by.....

Called by.....Department.....Extended by.....

Entered by.....Location.....Examined by.....

Check	Quantity	Description	Price	Unit	Extensions
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Meat Dept.—Back Room

1		Jim Vaughan Power Saw			
2		Meat Blocks			
1		Std Computing Scale No. 392253			
1		Hobart Grinder & Attachments			
3		Ceiling Fans			
1		York Ice Machine No. 72250			
1		Cutting Table			
1		U.S. Slicer No. 112077			
7		Assorted Pans			
1		Roll Paper Rack			
1		Gum Tape Machine			
1		Scoop Shovel			
1		Wash Sink			
1		Rail Offal Tray			
6		Hook Trees			
1		Fairbanks Scale			
58		Rail Roll Hooks			
1		Rail Scale			
1		Ice Box			
11		Iron Tubs			
231		Calif. Hooks			
195		Hooks			
1		Turkey Puller			
1		Fish Tank			

Amount Forward

[212]

Defendant's Exhibit "B"—(Continued)

INVENTORY March 11-45 Page.....

Sheet No..... Priced by.....

Called by.....Department: Produce Extended by.....

Entered by.....Location Bell Examined by M. S. Malone

Check	Quantity	Description	Price	Unit	Extensions
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Equipment

	1	Platform Scale			
	1	Four Wheel Flat Truck			
	3	Hand Trucks			
	6	Hanging Scale			
	1	Potato Truck			
	19	Shop Carts			
	28	Wire Baskets			
	1	Dayton Scale 2170205			
	1	Dayton Scale 2163526			
	1	Dayton Scale 2165162			
	1	Cash Reg. 3818926-2642-TX			
	1	Cash Reg. S684296KK N2033-15-7XIC			
	1	Cash Reg. 3321040 2842			
	2	Staple Guns			
	3	Tape Machine			
	2	Check Stands			
	9	Veg Stands— Subject to change			
	1	Garden Hose			
		R. P. Produce			
		Gordon B. Jones			
		Everett L. Wright			
	4	Ceiling Fans			
	1	Nat Cash Reg. No. 3251856			

Amount Forward	[213]
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Defendant's Exhibit "B"—(Continued)

INVENTORY March 11-45 Page.....

Sheet No..... Priced by.....

Called by.....Department Bell Extended by.....

Entered by.....Location Produce Examined by M. S. Malone

Check	Quantity	Description	Price	Extensions
	8 cr	Clee Carrot	2.50	20.00
	14 cr	Local Carrot	1.15	16.10
	11 c	Beet	.85	9.35
	7 c	Turnip	1.00	7.00
	4 c	Spinach	1.15	4.60
	6 c	Gr Onions	2.50	15.00
	2 Bx	Rhubarb	3.75	7.50
	17 sk	Cabbage	1.40	23.80
	½ c	Brocci	5.25	2.63
	2 cr	Celery	5.00	10.00
	76 cr	Heart	1.60	121.60
	17 cr	Lettuce	4.10	69.70
	2 Bx	Choke	5.50	11.00
	2 —	Grass 60 lbs.	.47	28.20
	85 lbs.	Peas	.07	5.95
	15 cr	Bellpepper	688 lbs. .10	68.80
	20 sk	Sp. Onion	2.15	43.00
	45 1	Burb	3.97	178.65
	121 2	Russet	3.22	389.62
	55 L	Tom	1540 lbs. .09	138.60
	5½ Bx	Pears	5.32	29.26
	3 only	pk Spinach	.09	.27
	11 pk	Salad	.09	.99
	3 sk	Rutabage	2.50	7.50
	1 cr	Pineapple	13.00	13.00
	25 Bx (2)	Oranges	1.50	37.50
	58 Bx (1)	Oranges	1.85	107.30
	4½ Bx	Lemon	2.50	11.25

Amount Forward 1378.17

Everett L. Wright
Gordon B. Jones

[214]

Defendant's Exhibit "B"—(Continued)

INVENTORY March 11-45 Page.....

Mdse. 1857.89
Supplies 314.64

Sheet No..... Priced by.....

Called by.....Department Bell Extended by.....

Entered by.....Location Produce Examined by M. S. Malone

Check	Quantity	Description	Price	Extensions
	13 Bx	64 Gfruit	2.20	28.60
	10 Bx	48 Gfruit	2.15	21.50 21.50
	5 Flat	Avocado	4.35	21.75
	8 Bx	Ortley Apple	3.88	31.04
	6 Bx	Ort Blk Apple	3.88	23.28
	21 Bx	Rome Apple	3.88	81.48
	18 Bx	Loose Pippin 684 lbs.	.08	54.72
	14 pk	Pippin	3.88	54.32
	22 Bx	Delic Apple	3.88	85.36
	2 Bx	Bell Apple 76 lbs.	5½	4.18
	236 lbs.	Popcorn	14¼	33.63
	76 lbs.	Mix Nut	.35	26.60
	26 lbs.	Peanut	.26	6.76
	1 Flat	Dates	6.50	6.50
		R. P. C. Produce		
		Gordon B. Jones		
		Everett L. Wright		

Amount Forward 479.72

[215]

Defendant's Exhibit "B"—(Continued)

INVENTORY March 11-45 Page.....

Sheet No..... Priced by.....

Called by Supplies Department Bell Extended by.....

Entered by.....Location Produce Examined by M. S. Malone

Check	Quantity	Description	Price	Extensions
		Garden Hose		
	6 qt	Paint (6)	1.00	6.00
	3 Bx	Staple	2.00	6.00
	1 pt	Blk Paint	.35	.35
	3 pk	7x11 Cand.	.88	2.64
	5 pk	11-14 Cand. (5)	1.76	8.80
	13 roll	18" Paper	1.70	22.10
	4 balls	100 Full Sheet Cord	7.04	7.04
	2 roll	Tape Gum	.72	1.44
	8M	4 lb. Bags	1.55	12.40
	½ Bx	3" Basket	3.60	1.80
	6 Ball	Twine 18 lbs.	.44	7.92
	2 Bx	Cello Bag	9.00	18.00
	1 Roll	Green Wax 55 lbs.	.11½	6.33
	1100	10 lbs. Bag	2.33	25.63
	2600	12 lbs. Bag	2.62	68.12
	1700	6 lbs. Bag	2.34	39.78
	1100	16 lbs. Bag	3.53	38.83
	9000	4 lbs. Bag	1.55	13.95
	500	10 lbs. Mesh Bag	5½	27.50
		R. P. C. Produce		
		Gordon B. Jones		
		Everett L. Wright		

Amount Forward 314.64

[216]

[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL PLAINTIFF'S EXHIBITS Nos. 2, 3 AND 4 TO CIRCUIT COURT OF APPEALS

Good cause appearing therefor, it is ordered that the clerk shall send Plaintiff's Exhibit 2, Exhibit 3, and Exhibit 4 to the Circuit Court of Appeals to

be used as a part of the record on appeal in the above-entitled action; said documents to be returned to this Court after their use in the Circuit Court has been completed.

Dated July 13, 1948.

/s/ PAUL J. McCORMICK,
District Judge.

[Endorsed]: Filed July 13, 1948. [217]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 217, inclusive, contain full, true and correct copies of Complaint for Declaratory Relief; Answer of Defendant Fireman's Fund Insurance Company; Answer of Defendant Jim Dandy Markets, Inc.; Answer of E. F. Smith including Exhibit A thereto (Plaintiff's Exhibit 13 at the Trial) and excluding Exhibit B thereto, which is the same as Plaintiff's Exhibit 7 at the trial appearing at page 60 of the certified record; Cross-Claim of Defendant E. F. Smith against Defendant Jim Dandy Markets, Inc., excluding Exhibit C thereto which is the same as Plaintiff's Exhibit 10 at the trial appearing at page 73 of the certified record; Answer of Defendant Jim Dandy Markets, Inc., to Cross-Claim of Defendant E. F. Smith, including Exhibits A, B, C, D, E and F, which are Plaintiff's Exhibits 5 to 10, inclusive, at

the trial; Cross-Claim of Defendant Jim Dandy Markets, Inc., against Defendant E. F. Smith; Answer of Defendant E. F. Smith to Cross-Claim of Defendant Jim Dandy Markets, Inc.; Decision and Order; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal of E. F. Smith; Designation of E. F. Smith of Contents of Record on Appeal; Notice of Appeal of Central Manufacturers' Mutual Insurance Company et al; Statement of Points on which Appellants Central Manufacturers' Mutual Insurance Company, et al Intend to Rely on the Appeal; Designation of Central Manufacturers' Mutual Insurance Company, et al of Contents of Record on Appeal; Plaintiff's Exhibits Nos. 1, 11, 12, Defendant Smith's Exhibits A and B and Order for Transmission of Original Plaintiff's Exhibits which, together with original plaintiff's Exhibits 2, 3 and 4 and copy of reporter's transcript of proceedings on April 9, 1948, transmitted herewith, constitute the record on appeals to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$41.20 of which sum one-half has been paid by each of the appellants.

Witness my hand and the seal of said District Court this 16th day of July, A. D. 1948.

(Seal)

EDMUND L. SMITH,

Clerk.

By /s/ THEODORE HOCKE,

Chief Deputy Clerk.

In the District Court of the United States for the
Southern District of California, Central Division

Honorable Leon R. Yankwich, Judge presiding.

No. 6838-Y—Civil

CENTRAL MANUFACTURERS' MUTUAL
INSURANCE COMPANY, a corporation;
INDIANA LUMBERMANS MUTUAL
INSURANCE COMPANY, a corporation,
Plaintiffs,

vs.

JIM DANDY MARKETS INCORPORATED,
a corporation; FIREMAN'S FUND
INSURANCE COMPANY, a corporation;
E. F. SMITH,

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

Friday, April 9, 1948

Appearances: For the Plaintiffs: Thomas P. Menzies, Esquire; and Harold L. Watt, Esquire. For the Defendant Jim Dandy Markets Incorporated: Harry G. Sadicoff, Esquire. For the Defendant Fireman's Fund Insurance Co.: Messrs. Hindman & Davis, By—E. Eugene Davis, Esquire. For the Defendant E. F. Smith: Clyde Thomas, Esquire; and Milan Medigovich, Esquire.

The Court: Call the case, Mr. Clerk.

The Clerk: Central Manufacturers' Mutual In-

insurance Company and others versus Jim Dandy Markets and others, No. 6838-Y, Civil.

Mr. Thomas: We are ready.

Mr. Sadicoff: Ready, your Honor.

Mr. Menzies: Plaintiff is ready.

Mr. Davis: We are simply here listening, your Honor.

The Court: Would you gentlemen care to make opening statements as to the issues in the case before we have any testimony?

Mr. Sadicoff: I will be happy to make an opening statement if your Honor wants to hear me.

The Court: And you represent—

Mr. Sadicoff: I represent the defendant Jim Dandy Markets.

The Court: And who represents the plaintiff?

Mr. Menzies: I represent both the plaintiffs, your Honor, along with Mr. Watt.

The Court: Yes.

Mr. Menzies: May I proceed?

The Court: Yes, you may proceed.

Mr. Menzies: This is an action for declaratory relief [5*] brought by the plaintiffs against the named defendants herein. The facts briefly are these.

Policies of insurance were issued to the Jim Dandy Markets, our own policy and one by the Fireman's Fund, who is a defendant in this action.

After our policies were issued there was entered

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

into several written documents between the Jim Dandy Markets, a corporation, and E. F. Smith, wherein these various agreements of sale or whatever you choose to call them, whether conditional sales contracts or whether merely an option to purchase a number of markets. Among them I believe there were six or eight markets and among those markets there was one known as the Atlantic Market which subsequently was destroyed by fire.

In these documents the court will be required to pass upon the nature of the documents, whether or not they conveyed title to the Jim Dandy Markets or whether title remained in the vendor, Mr. Smith.

After the original document was entered into there was then a supplemental agreement.

The Court: Was this brought originally in this court or was it brought in the Superior Court?

Mr. Menzies: No; it was originally brought by us, sir.

The Court: It is under the Federal declaratory relief Act?

Mr. Menzies: That is correct. [6]

The Court: I didn't know whether it came here by removal because of diversity of citizenship.

Mr. Menzies: Diversity of citizenship exists in this way; plaintiffs are citizens of other states and all of the defendants are citizens of the State of California.

The Court: Very well.

Mr. Menzies: These documents called for certain payments to be made by the Jim Dandy Markets

to Mr. Smith. Under Mr. Smith's original lease covering the ground upon which this Atlantic Market was placed it gave Mr. Smith the title and possession and the right to remove the building at the expiration of his lease.

Then, an escrow was opened up with the Morrison Escrow Company and those instructions will be introduced into evidence here. And in that escrow was deposited certain documents that were to be delivered upon the close of the escrow and the court will be called upon to determine whether or not those escrow instructions superseded the original and supplemental agreements and the various leases that have been executed between the parties.

The fire occurred and an adjustment of the loss—an adjuster's agreement fixing between the plaintiff and the Jim Dandy Markets the sound value of the property at the time of the fire and the loss and damage as a result of the fire. That document is before the court. [7]

The Fireman's Fund Insurance Company had a policy with Mr. Smith in the sum of \$16,500. Our two policies were in the sum of \$12,500 each, or a total of \$25,000.

After the fire occurred there were still payments to be made under the original agreement and the supplemental agreement, and in accordance with the agreement between Smith and the Jim Dandy Markets, and the final payment was made covering this Jim Dandy Market after the fire. I have forgotten how many days after. Mr. Sadicoff undoubtedly will recall that date. Do you have it?

Mr. Sadicoff. Yes.

Mr. Menzies: The fire occurred in January and in March, about two months later, why, they made the payment as a result of the leases, the supplemental, or, the original agreement and the supplemental agreement and the escrow instructions.

There is first a controversy as to who actually owned the building which was occupied at the time by the Atlantic Market; whether or not at the conclusion of the lease Mr. Smith had the right to the building and the right to remove it, or whether it passed to the Jim Dandy Markets.

If Mr. Smith had the right to retain the title to the building and to remove it, then there is a question that will have to be determined as to whether this was merely a leasehold interest that the Jim Dandy Markets had or whether or not it was the intention of the parties to pass title along [8] with the lease to the building.

The Court: Let me ask you a question. How would the insurance company be interested in that?

Mr. Menzies: In this respect, your Honor. Our policy had a permit for leased ground. It also had on it sole and unconditional ownership—the regular clause—standard fire insurance policy.

The Court: I am familiar with that. I had a case very recently in which I wrote an opinion about the question of both ownership and failure to disclose the existence of an encumbrance. I wanted to know how you are interested.

Mr. Menzies: That is one point of it, sir. There

are one or two others that are involved as between the vendor and vendee.

If the court holds that situation to exist then of course our consent on leased ground would be affected in that respect—that there isn't any question but what a vendee has an insurable interest and our consent to taking that interest on leased ground would place us in the position that we would succeed to any rights that the vendee had with relation to the vendor's insurance under our subrogation provision of the policy and in that extent, I believe, that the law is this—that the vendor also has an insurable interest, but assuming that he has that interest and has it insured, he must apply the proceeds of that insurance upon [9] the vendee's indebtedness to him.

The Court: Who constructed this building? That is important, because if the building was there when this lease, as you call it, was entered into then the covenants of the lease would have to be interpreted to see if they complied with the continued presence of the building during the period of the lease, or whether the lease was terminated by the fire and if so what obligation there was so far as the remainder of the term was concerned. Was the defendant merely the lessee and merely relieved of the payment of the rents or was he entitled to something more?

Mr. Menzies: There is no fire clause in the lease as I have read them. As I understand the evidence will show this on the part of the defendants, that Mr. Smith leased this ground, constructed

the market and operated it for a time and after it was in operation this agreement to purchase, and it is the contention of some of the parties that it was merely an agreement to purchase, the contents of the building—that is, the furnishings and fixtures and stock in trade, and Mr. Smith retained the title to the building and the right to remove it at the termination of the lease. These payments were made partly on account of the purchase price of the stock in trade and the furnishings or furniture and fixtures, and as a rental under the lease.

I believe that Mr. Smith paid the taxes and then in [10] turn was reimbursed by the sub-lessee, which was the Jim Dandy Market.

Does that cover the question that your Honor had in mind?

The Court: Yes.

Mr. Menzies: Then there was another lease that I understand that the defendant Smith is intending to place in evidence, where in that lease—and you have a copy of it—there is a copy of it here—that lease is to this effect. That they acknowledge the ownership of Mr. Smith in the building and the title to it. I think that briefly are the questions.

The Court: Let me hear that again. I didn't quite get the import of the last statement.

Mr. Menzies: There is another document that has not been introduced in evidence and I understand the demands for admissions have been used and what is the result of the demands I don't know, but it affects a sub-lease under the date of the 1st of July, 1945, between Charles Solder, Leo A. Gold-

berg, Earl I. Swetow, Max M. Berick, and Norman Schuster, a co-partnership doing business under the name and style of Jim Dandy Markets.

At the outset of the transaction between Smith and the Jim Dandy Markets, the Jim Dandy Markets was operating as a partnership and thereafter it became a corporation, and [11] the corporation succeeded to all of the rights, title and interest, if any, that the partnership had in and to the business. And also assumed and agreed to pay the obligations of the partnership insofar as it affected the proceedings in this case.

There was no knowledge on the part of the plaintiffs here of any of the transactions that took place between the defendant Smith and the Jim Dandy Markets either during the time that it was a partnership or after it became a corporation. And that matter, I think, is probably in dispute. I don't think Mr. Sadicoff is—

The Court: Let me ask you this question. I have had occasion to study that problem very recently and I wrote an opinion which contains all the latest cases on the subject and the law of California which, of course, would govern here regardless of the fact that you brought it in this court. It is the substantive law of insurance and the law of California as I read it and expressed in a very recent opinion, *Gawecki vs. Fire Insurance Company*, 72 Fed. Supp. 435. That opinion was to this effect:

That the clause in the insurance policy which provides that the application shall state the owner-

ship and sole ownership, that that clause is not violated by the mere fact that there was no disclosure; that clause is violated only if there has been concealment, and that unless the company had [12] actually instituted inquiry which resulted in concealment that this clause does not apply.

Mr. Menzies: I appreciate that, your Honor.

The Court: This case didn't turn upon that point. That point was raised and I thought at first the case would turn on that point but ultimately this case turned on the proposition of the suspension of the insurance through the existence of a mortgage of which the insurance company did not have knowledge.

Mr. Sadicoff: We have cited such cases, your Honor.

The Court: I haven't had an opportunity to read your briefs, gentlemen. I am just finding my way along and trying to determine what the issues are. As I say, I am familiar generally with the principles involved and had occasion to pass on them quite recently.

Mr. Menzies: The question here will not turn on that particular point as I understand it, your Honor. The question here is whether they had an insurable interest and if they did have that then are we entitled to the contribution from the other carrier, insofar as Mr. Smith would then be a trustee, of the proceeds of that policy for the use and benefit of the Jim Dandy Markets?

The Court: Was the other carrier brought in through a third party pleading?

Mr. Menzies: We brought the other carrier in here and [13] I understand that there has been filed a cross bill. There is also the pleadings in the file of an action in reformation between Smith and the Jim Dandy Markets, Smith contending that he is the owner of the building and that the Jim Dandy Markets are not. And then I believe that Jim Dandy Markets have filed a cross bill endeavoring to secure credit for the payment of any that the Fireman's Fund—

The Court: Do you represent all the defendants?

Mr. Sadicoff: No. I represent the Jim Dandy Markets.

The Court: Who represents the defendants?

Mr. Thomas: I represent Mr. Smith and Mr. Davis represents the Fireman's Fund.

Mr. Sadicoff: Mr. Menzies, have you finished with your statement? If not, I want to supplement the statement.

The Court: That is all right. I am asking both sides to give me an idea of the issues and the others, the cross complainants or whatever they are.

Mr. Menzies: I think that primarily covers it unless some of the other gentlemen care to supplement my statement.

Mr. Sadicoff: I think Mr. Menzies overlooked some very, very important facts, otherwise I wouldn't make a statement.

For some time, your Honor, prior to July 1946 the defendant Smith was the operator of a chain

of these so-called super markets, consisting of eight units. Upon four of those units he held leases and upon four of them he owned the [14] real property.

In July of 1945 he entered into an agreement with Jim Dandy Markets, a partnership, under which he leased to Jim Dandy Markets the four properties that he owned, and under which he subleased to Jim Dandy Markets the four properties that he was leasing from others, including the market that we will doubtless all refer to as the Atlantic store, and which is the subject of this litigation.

Under that agreement of July 1945 it was provided that at the end of ten years the Jim Dandy Markets would have the right to purchase the equipment in those eight markets upon the payment to Mr. Smith of the sum of \$192,500.

They operated under that agreement until July of 1946, at which time they entered into what was denominated a supplemental and modified agreement.

The contract is dated June 12th, 1946, but I believe the evidence will show it was actually executed and delivered at the Morrison Escrow Company in Huntington Park on June 27th, 1946.

After Mr. Smith made the original agreement with Jim Dandy Markets on July 1st, 1945, he had issued to him by the defendant Fireman's Fund, a policy covering all of the buildings on all the eight stores—eight buildings, and specifying the various amounts covering each particular building and the Atlantic store. It was insured for \$14,500. [15]

Now, in July of 1946 he entered into an agreement with Jim Dandy Markets, then a partnership, under which he executed leases upon the four properties that he owned, to Jim Dandy Markets and executed an assignment of his leases on the other four, including the Atlantic store.

Now, on the Atlantic store, and also on another unit called the Ontario store, he had built the buildings, and the leases provided that at the expiration of the term of the lease or any extensions he may remove the buildings.

At the time he executed the so-called supplemental and modified agreement of June 1946, and simultaneously with the execution of that agreement, certain escrow instructions were executed by the parties, photostats of which are included in the pleadings, which escrow instructions and also the agreement provided that he would deliver into escrow an assignment of the leases, including assignments of the leases—of the two leases that he had on the Atlantic store because that property had two ownerships.

The supplemental agreement provided that he sold to Jim Dandy Markets all of the equipment in the eight stores. He assigned the leases without any reservations of rights to the building. They are out and out assignments. And the contracts provided that we were to pay him \$225,000 payable by a credit of \$50,000 of which monies he has had, and a payment of \$5,000 a month. [16]

Simultaneously with the opening of that escrow

and the execution of the supplemental agreement in June of 1946, he actually delivered assignments of leases in escrow, assigning those leases to and including the Atlantic store, to Jim Dandy Markets. Immediately upon, or very shortly after that agreement was the supplemental agreement which was executed and the escrow instructions were signed and the various documents required to be delivered into escrow by Mr. Smith, Jim Dandy Markets took out insurance upon the so-called Atlantic store in two policies that were issued by the plaintiffs in this action, each for \$12,500, making a sum total of \$25,000.

All of the payments required to be made under the supplemental agreement which, when your Honor reads it your Honor will note is not an option to buy—it is an unequivocal agreement under which Smith agrees to sell to us and we are under obligations to buy, and all of the payments were made and there was never any default in the payments, to and including the 14th day of January, 1947, at which time the Atlantic store was completely destroyed by fire.

We immediately notified our insurance carriers, the plaintiffs in this action, of the fact that the property had been destroyed by fire and there is no contention that we failed to do that—that we failed to do anything that we were required to do. [17]

Under the supplemental agreement it provides that if we want to release any of the units and take title immediately and get the various docu-

ments delivered to us out of escrow, we could do so by payment of certain specified sums—certain percentages. In March, and following the fire, and when we were not in default under the terms of the agreement, the full amount that was due under the contract for the Atlantic Store was paid to Mr. Smith and was received by him. And I think the evidence will show that in August of 1947 the sum total of \$225,000 was paid to Mr. Smith.

It is my understanding that Mr. Smith contends, but notwithstanding the fact that he executed an assignment to us of the leases which we contend carried all rights that he had, including the right to the building and the right to remove the building and the right of occupancy, that he had some sort of a mental reservation that he didn't intend to sell the buildings.

I think the evidence will show notwithstanding the fact that we were to have possession of the Atlantic store for on close to ten years and the Ontario store for ten years, and notwithstanding the fact that Smith still claims he was the owner of the Atlantic building and that he is also the owner of the building at Ontario, he never charged us any rent for it, which, we contend, of course, is proof of the fact that he intended to convey the building to us and that [18] we always thought we bought the building.

Now, I think the evidence will show that all taxes that were assessed against the Atlantic store subsequent to June of 1946 were not paid by Smith—

they were paid by us. We have always contended and still contend that we were the sole and unconditional owners of that property and that the cases are legion to the effect that you don't—that a vendee under a conditional sales contract is the sole and unconditional owner of the property.

The Court: Mr. Thomas.

Mr. Thomas: Yes, your Honor. As to the question of title. That came after the fire and that was whether the building was the subject matter of the contract and not whether the title of what was the subject passed, but whether the building was the subject matter.

Now, the general statement that Mr. Sadicoff made is a fair recital of the sequence of events but there are some things that were not mentioned and that I would like to call your Honor's attention to as showing that this building, and our theory is, that this building was never a subject matter of this contract.

Now, in the beginning the lease was a land lease only and the fact the the building burned or did not, did not affect the status of the lease. The building had been built by Smith with the privilege recited in the land lease, that at the termination of it he could remove the building, recognizing that he built it and that it was his.

Now then, it was under that lease that the original contract which leased to Jim Dandy Markets the machinery, equipment and facilities in the various markets and the stock in trade was sold

outright. The shelves and the scales and all of those things were sold or leased for ten years.

Sub-leases were made on the buildings, as Mr. Sadicoff pointed out, under which Jim Dandy Markets was holding as a sub-lessee under Smith, with the provision that if the termination of the sub-lease and the lease under which he was terminated was changed—that is, if they couldn't get a renewal and so forth he would help them to do so; if they had to pay more rent they would have to adjust it. That was all spelled out.

And while I am on the question of the sub-lease—I will change that.

After about a year's operation, as he pointed out, a new deal, a new arrangement was made by a supplemental and modified agreement which did not obliterate the old one, the modification being that the Jim Dandy Markets purchased immediately under conditional sales contract the same facilities—machinery and equipment which it had leased under the original agreement.

It then provides that that will become effective [20] on the first of the next month—the first of July, this having been done in June, and that the lease by which that equipment was leased under the original agreement will terminate and the conditional sales contract will become effective as of the first day of July 1946.

The Court: What was the date of the first one?

Mr. Thomas: The date of the first one was January 14th, 1947. Now, this contract further pro-

vided that assignments of leases would be made on the building sites where he did not own property—that is, the land, and the four in which he did. He made leases to rent those.

The contract then provided that as to such assignment of leases they would become effective after the full purchase price of the equipment had been paid and were delivered out of escrow. These assignments were delivered into escrow, as pointed out, together with a bill of sale for the facilities.

Now, the contract further provided that in the meantime the sub-lease executed under the original agreement would stay in effect. So, at the time of the fire we had this condition. That the Jim Dandy Markets were in possession under a sub-lease—

Mr. Sadicoff, this is one of the places I want to modify your statement by calling attention to the fact that no demand was made for rent, but the sub-lease executed on the Atlantic Market provides and refers to the fact that Smith is the owner of the building. It provides what rents shall be paid. It provides that it shall pay the rent as provided in the agreement and the rent which was due on the land lease. It also provides that the sub-lessee will pay and meet all other obligations provided in the land lease. The land lease provided that taxes would be paid by the lessee.

The Court: Sub-lease was between whom?

Mr. Thomas: Smith and the Jim Dandy Markets.

The Court: That was undertaken between them.

It was not an undertaking between the Atlantic and Mr. Smith.

Mr. Thomas: Undertaking between Jim Dandy and Mr. Smith.

The Court: The clauses you speak of were contained in the sub-lease between Jim Dandy Markets and Mr. Smith.

Mr. Thomas: The landowner's lease provided that Smith should pay a certain specified sum as rent and that he should pay all taxes. The sub-lease provided also, of course, that Smith owned the building.

The Court: And the sub-lease was between whom?

Mr. Thomas: Mr. Smith, the plaintiff and cross complainant, and the Jim Dandy Markets. That lease provided that certain sums would be paid. It had reference to the amount of rent that was being paid on the store for the equipment, provided that the sub-lessee would pay the rent due on the land lease and would pay all other obligations due on the land lease. In other words, the taxes.

I think the evidence will show the taxes were actually paid by Smith and refunded under the terms of the sub-lease. The point I am getting at is that that is contradictory to his statement that that was a provision provided in the writing and not in subrogation of their title.

Now, the next point I want to call your Honor's attention to was that in putting this building in as a part of it was in the fixing of values. Under the

supplemental and modified agreement each market was given a value and the value subject to a reduction because of the down payment of some \$13,000 divided according to the, pro rata, divided according to the balance there was left as the balance due on the Atlantic Market which was \$27,300, and the total value with the credit against the other was about \$31,000.

The agreed loss of this building is over \$32,000 so we have a situation to show that that was not—there is one point before that.

The contract provides that as to the equipment, facilities and so forth, the purchaser, Jim Dandy Markets, shall keep it insured with a loss payable clause to Smith. It makes no reference to the building whatsoever.

That clause was carried out. Jim Dandy Markets kept the equipment insured for \$20,000 and when the fire occurred the \$20,000 policy was paid. That was the money that went to pay off the great bulk. That was the money that went to pay off the great bulk of the debt. All but \$1,700 was the insurance money on the equipment that paid off the balance due to Mr. Smith.

Now we come then to the situation showing that the facilities, and the testimony will be, that that was the element against which the value was fixed on the store. The building would double that value so that we have a situation—the very strongest point in evidence, that the building was not included in the subject matter. He would actually be

selling it for less than fifty per cent of the established value of the property in all of these documents. Except for the sub-lease no reference is made to the building except in the assignment which was in escrow and which was not yet delivered. Now, that assignment was in exactly the same form as all of them and referred to a lease of land and buildings which, of course, was an inaccurate statement if it was intended to apply to this, and shows that it was ineptly drawn as including a building when it was not supposed to have included the building.

Our suit for reformation is to change those words on the assignment for the reason that the other documents, together with the value and the fact that they were tenants as [24] of the time of the fire under a sub-lease, recognizing the title of the building in Smith, and no provision being made at any place for any payment for the building, that therefore it was clearly not a contract to sell this market for one-half of its value, but was simply a mistake in the drawing of the assignment as to what effect it had. Furthermore, since that value is there the payment under the conditional sales contract was clearly being made on the equipment. It even shows eventually the assignment might have carried the building with it.

The fact was that it was a consequential thing and not a part of the agreement, the land lease itself having no obligation to maintain a building on there.

That is the theory on which we will submit the case.

The Court: Have you anything to say Mr. Davis?

Mr. Davis: I have been saying all the time that I am either getting a free ride here or I am not in court at all. Let me outline the situation as I see it.

In 1945 Smith was the owner of this building—held the ownership by virtue of being a lessee with the right of removal of the building. At that time, in 1945, he insured the building in the Fireman's Fund. In 1946 Smith entered into this deal with the Jim Dandy Markets by which their previous deals were modified, and at that time executed the contract, so-called conditional sales contract, and executed and delivered an assignment of the lease to this building, which carried with it, I think, without question, the ownership in the building, to the Jim Dandy Markets. After that was done the two policies executed by the plaintiffs were executed and delivered to Jim Dandy. The Fireman's Fund policy was issued in 1945 and the plaintiffs' policies were issued to Jim Dandy in 1946. The fire occurred in 1947.

Now, plaintiffs have brought an action here, the two plaintiffs, in which they join the Fireman's Fund together with all the other defendants—all citizens and residents of the State of California. The Fireman's Fund Insurance Company is a California corporation, and the sole issue, as I see it, is between the plaintiffs and Jim Dandy, because

under the law as we will cite to your Honor these contracts are wholly several.

The two plaintiffs have no interest whatsoever in the contract that Smith had with Jim Dandy. The law is positive on that point.

The Court: That is why I asked that question of Mr. Menzies, what interest they claim in any dispute with them, and, of course, his answer was that their rights may be affected, depending upon whom we find to be the owner and entitled to ownership of the building and entitled to receive this insurance. [26]

Mr. Davis: There is no issue here in this case against the Fireman's Fund. My point is there is no issue made against us except the issues made by Mr. Menzies.

The Court: Was there a motion made to strike the cross complaint on the ground the court had no jurisdiction?

Mr. Davis: I suggested it in my answer.

The Court: I found none. But if such a motion is made before me I will deny the motion unless counsel produces authorities to show that the present rules have been interpreted differently than the Supreme Court interpreted them.

Mr. Davis: Your Honor, the cross complaint is not against my client. There is no cross complaint against me. It is between Smith and the Jim Dandy Markets.

The Court: But they have not raised the point.

Mr. Davis: It was raised and withdrawn by Mr. Sadicoff.

Mr. Sadicoff: I withdrew it because I became convinced that I was wrong, and I thought it was my duty.

The Court: I was just asking the question to see what the state of the record is.

At the present time under liberal rules of pleading which, of course, obtained in California since 1925, they passed the liberal rule of pleading so any person may be joined as a defendant who has an interest or as to whom there may be a common question of law. In other words, the Federal statute is in many respects the same statute as we have had in California since 1925. As a matter of fact, the first law review article I wrote for the Southern California Law Review after it was established, was a long 40-page article on this new section.

At that time there was no precedent and I analyzed all the English precedents and whatever precedents we had in the State courts, to show the objective of this statute so that if there was a common question of law that affects you, you will be enjoined.

Mr. Sadicoff: I would like to call your attention to just one matter, and that is this, that in connection with the construction of these documents I don't think that they require any construction, but assuming that there is any ambiguity, all these documents were prepared by Mr. Smith—the documents that we signed.

The Court: That is a question, of course, to come up later on because whatever inference may be drawn from that fact only has bearing upon intent. But I don't want any particular piece of testimony called to my attention at the present time. What I want is to clarify the issue.

One more question and then I will give you a short recess, and then we will go on after twelve o'clock to make up for the time we have lost. Ordinarily when there is a pre-trial hearing it is followed by a pre-trial order which is signed by the court, and sets forth any stipulations or agreements or [28] clarification of issues. I have looked through this file and I do not find any such order.

Mr. Menzies: There is none.

The Court: Then of course there is nothing in the pre-trial hearing, unless the transcript shows some admissions, that would be of any assistance in the determination of this issue. If there is any I wish you gentlemen would call my attention to it.

Mr. Menzies: I think we can.

The Court: Let us take a short recess.

Mr. Menzies: There is one thing I believe Mr. Watt would like to call to the court's attention to supplement some of the statements that have been made.

Mr. Watt: I have this one observation to make. The statements of counsel sufficiently illustrate the reasons which have prompted the declaratory relief action, and we don't want to overlook that issue, whether the Jim Dandy Markets had an insurable

interest, and we think it will be necessary to determine the question of ownership in order to determine whether they had an insurable interest.

The Court: Mr. Watt, I am going to refer to something personal. You know my interest in the declaratory judgment law. I think you heard the first speech I ever delivered on the subject before I went on the bench, and that interest has continued. As a matter of fact, I have an article in one [29] Federal Rules decision on the subject which is a lecture I delivered at the request of Judge Wilbur when we held our first conference which analyzed all the decisions which had been made in Federal Courts up to that time. In all my writings I have called attention to the great benefit which we derived from this statute, as I used to illustrate it sometimes to my students in law school when I taught the subject of pleadings, and I had to teach declaratory judgment, I said, in the old days, if a dispute arose as to whether a man had a lease on a piece of land and could tear down a four-story building and build a twelve-story building without violating the lease, I said the man actually had to start tearing down the building and the other man had to run to court and get an injunction. Now he just goes over to the other man and he says, "Look, I want to rebuild a building which will revert to you at the end of the period." The other fellow says. "You can't," and upon that he comes to court and nobody is hurt. That is what the cases call invoking the jurisdiction of the court, whether

you use coercive measures or not, and before any detriment has been caused to anybody. So, so far as I am concerned, I welcome these declaratory judgment cases because I approve of the philosophy which lies behind this form of procedure, which, incidentally, we borrowed from England, as we have borrowed every important reform in the realm of civil procedure. I [30] want to give the English Bar and the English judges that compliment—all the good things we have in our procedure, including the rules of joinder and including declaratory judgment, we have borrowed from the English court rules which anticipated those by 30 or 40 years.

Let us take a short recess.

(Short recess.)

The Court: Proceed, gentlemen.

Mr. Thomas: May I interrupt to make this suggestion? As I understand it, all evidence will be applicable to the cross complaint and the other proceedings without having to re-introduce it on the cross complaint.

The Court: Yes, I think so. The order of proof doesn't really matter. I will qualify that by saying except such oral testimony as may come in with reference to intent. I presume oral testimony will be introduced on the subject of the intention of the parties and, of course, that shouldn't come in until the plaintiff has put in his case.

Mr. Davis: It will all be introduced subject to a motion to strike.

The Court: No, no, make your motions immediately.

Mr. Davis: Make our objections?

The Court: Make your objections at the time. I am old-fashioned, Mr. Davis. I believe in the rules of evidence. I don't keep things suspended in the air. Make your motions [31] and I will rule as to whether it is material or not.

Mr. Thomas: I didn't have that in mind. I had in mind this. Now, the plaintiff wants to offer certain documents and I will want those same documents on the cross claim.

The Court: If they are in the record you don't have to adopt them. You don't have to re-introduce them.

Mr. Thomas: That is what I didn't want to do.

The Court: If there is any evidence in the record that has a bearing upon the issues in the case the court may draw any inferences, favorable or unfavorable, to any litigant, whether his position is as an actor in the case or otherwise, the plaintiff or cross complainant or as a defendant. It isn't necessary to re-introduce the same evidence in your behalf.

Mr. Thomas: That is what I wanted to have clear.

Mr. Menzies: If the court please, at this time I will offer in evidence the reporter's transcript of the pre-trial hearing. I do that for the benefit of the court and perhaps it may shorten the time of trial here. I will ask that that be marked as Exhibit 1.

The Court: Do you want me to use the copy that is on file?

Mr. Menzies: I have it here.

The Court: There is a copy; we have the original. It may be received. [32]

Mr. Davis: I want to object to the introduction of any statements as against the defendant Fireman's Fund Insurance Company, on the ground that plaintiffs' claim or any of the pleadings in the case do not state any ground upon which relief can be granted against this defendant.

The Court: All right, the objection is overruled.

The Clerk: Plaintiffs' Exhibit 1 in evidence.

(The transcript referred to was marked Plaintiffs' Exhibit 1, and was received in evidence.)

[Plaintiffs' Exhibit No. 1 set out in full, page 139 of this Transcript of Record.]

Mr. Menzies: I will now offer in evidence photostatic copies of the policies of the Central Manufacturers' Mutual Insurance Company, being policy No. F-321452, and Policy No. 3170 of the Indiana Lumbersmens Mutual Insurance Company, and ask that those two policies be marked Plaintiffs' Exhibit 2.

The court will note that in the transcript of the pre-trial hearing it was stipulated that photostatic copies might be used.

Mr. Davis: I make the same objection as previously made.

The Court: The objection will be overruled.

Mr. Sadicoff: May I suggest those be introduced in evidence as Plaintiffs' Exhibits 2 and 3, rather than have them one exhibit, Mr Menzies?

Mr. Menzies: I have no objection.

The Court: How many are there?

Mr. Menzies: Two policies.

The Court: We had better mark them separately.

Mr. Menzies: May the one of the Central Manufacturers' in order to keep the record straight, be marked Exhibit 2, and the one of the Indiana Lumbermans Mutual as Exhibit 3? May the record show that?

The Court: Yes.

(The policies referred to were marked Plaintiffs' Exhibits 2 and 3, and were received in evidence.)

Mr. Menzies: I will now offer in evidence Policy No. A-959495 of the defendant Fireman's Fund Insurance Company, and ask that be marked Exhibit 4.

Mr. Davis: To which I make the same objection, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Davis: And upon the ground that the plaintiffs' complaint or any of the pleadings do not state grounds upon which relief can be granted against this defendant.

The Court: All right.

The Clerk: Plaintiffs' Exhibit 4 in evidence.

(The policy referred to was marked Plaintiffs' Exhibit 4, and was received in evidence.)

Mr. Menzies: Now, in order to save encumbering the record, your Honor, with additional documents, there are [34] attached to the answer of the Jim Dandy Markets, the defendant in the case, certain leases marked Exhibit A, and I will offer those exhibits that are attached to the answer of the Jim Dandy Markets as Exhibit 5, or if the court prefers, we may break them down into each document.

Mr. Sadicoff: Will you pardon a suggestion, Mr. Menzies?

Mr. Menzies: Glad to have it.

Mr. Sadicoff: In the answer of the defendant Jim Dandy Markets to the cross claim of the defendant, E. F. Smith, there is contained the various documents in chronological order and I would suggest that you, rather than having the exhibits of the answer to your complaint in evidence, that it would be the exhibits attached to the answer of the defendant Jim Dandy Markets to the cross claim of E. F. Smith.

Mr. Menzies: I have no objection to that.

The Court: All right. You have quite a large number, gentlemen. You have Exhibit A, which consists of a number of documents. Likewise, Exhibit B and Exhibit C, consist of several, and Exhibit D consist of three. I think these will be taken individually and introduced by reference.

Mr. Menzies: Very well. I will follow the court's suggestion.

They are marked here in the answer of the cross claim as Exhibit A, consisting of two pages; Exhibit B, which [35] is a letter bearing the date of February 1, 1942.

Mr. Sadicoff: That is part of the lease.

The Court: Let us do it this way. Exhibit A is an instrument, a lease dated the 29th of February, 1941, and that will become Plaintiffs' Exhibit 5.

(The lease referred to was marked Plaintiffs' Exhibit 5, and was received in evidence.)

[Printer's Note]: Plaintiffs' Exhibit No. 5 is attached to Answer of Jim Dandy Markets, Inc. to Cross Claim of E. F. Smith as Exhibit A and is set out at page 56 of this printed record.

Mr. Menzies: Then Exhibit B in the answer to the cross bill is a document bearing the date of February 1st, 1942, addressed to E. F. Smith and signed by Ethel William Hartley—I can't quite make out the signature.

Mr. Sadicoff: Sarah Muriel Wellings.

Mr. Menzies: I ask that that be marked as Exhibit 6.

The Court: All right.

(The document referred to was marked Plaintiffs' Exhibit 6, and was received in evidence.)

Mr. Sadicoff: We are making an error here. That is attached to the lease dated the 1st of February, 1942, between Thomas A. McLenaghan as Ad-

ministrator of the Estate of E. T. Williams and E. F. Smith, which is likewise Exhibit B of that.

The Court: Then they should be marked as one exhibit.

Mr. Menzies: And that will be exhibit what?

The Court: That will be Exhibit 6.

(The document referred to was marked Plaintiffs' Exhibit 6, and was received in evidence.)

[Printer's Note]: Plaintiffs' Exhibit No. 6 is attached to Answer of Jim Dandy Markets, Inc. to Cross Claim of E. F. Smith as Exhibit B and is set out at page 60 of this printed record. [36]

Mr. Menzies: Then Exhibit 6 will consist of—

The Court: Consist of the lease and the attached letter.

Mr. Menzies: That is marked Exhibit B and attached to the answer.

The Court: Yes.

Mr. Menzies: May that be received in evidence?

The Court: That has been received as No. 6.

Mr. Menzies: Now, I will offer as Exhibit No. 7 in evidence Exhibit C of the answer which is attached to the answer to the cross bill, which is entitled "Supplementary and Modified Agreement" under the date of the 12th day of June, 1946, between Smith and the partners that constitute the Jim Dandy Markets.

The Court: That will be received as Exhibit 7.

(The document referred to was marked Plaintiffs' Exhibit 7, and was received in evidence.)

[Printer's Note]: Plaintiffs' Exhibit No. 7 is attached to Answer of Jim Dandy Markets, Inc. to Cross Claim of E. F. Smith as Exhibit C and is set out at page 65 of this printed record.

Mr. Menzies: I offer in evidence as Exhibit 8 the Exhibit D which is attached to the answer to the cross bill and is entitled "Escrow Instructions", bearing the date of June 13, 1946, Escrow No. 7559-E.

The Court: You had better include the next one which is marked 3-D.

Mr. Menzies: That is correct.

The Court: They should be received as one document. [37]

Mr. Menzies: That is correct. It consists of three pages which are marked 1-D, 2-D, and 3-D.

The Court: All right, that is received as Plaintiffs' Exhibit 8.

(The documents referred to were marked Plaintiffs' Exhibit 8, and were received in evidence.)

[Printer's Note]: Plaintiffs' Exhibit No. 8 is attached to Answer of Jim Dandy Markets, Inc. to Cross Claim of E. F. Smith as Exhibit D and is set out at page 74 of this printed record.

Mr. Menzies: Now I offer in evidence as Exhibit 9, Exhibit E, which is attached to the answer to the cross bill of Smith, a document entitled "Bill of Sale." It bears the date of the 27th day of June, 1946.

The Court: It will be received as Plaintiffs' Exhibit 9.

(The document referred to was marked Plaintiffs' Exhibit 9, and was received in evidence.)

[Printer's Note]: Plaintiffs' Exhibit No. 9 is attached to Answer of Jim Dandy Markets, Inc. to Cross Claim of E. F. Smith as Exhibit E and is set out at page 84 of this printed record.

To clarify the matter, that consists of three pages, the first two of which are the bill of sale, and the third page an assignment of a lease.

Mr. Sadicoff: That is a separate lease.

Mr. Menzies: That is a different document.

The Court: I am sorry, you are right.

Mr. Menzies: That is marked Plaintiffs' Exhibit 9?

The Court: Yes.

Mr. Menzies: And I will offer as Plaintiffs' Exhibit 10, Exhibit F which is attached to the answer of the defendant Jim Dandy Markets to the cross bill of the defendant Smith, and an assignment of a lease consisting of two pages, bearing [38] the date of the 27th day of June, 1946.

The Court: It may be received.

(The document referred to was marked Plaintiffs' Exhibit 10, and was received in evidence.)

[Printer's Note]: Plaintiffs' Exhibit No. 10 is attached to Answer of Jim Dandy Markets, Inc. to Cross Claim of E. F. Smith as Exhibit

F and is set out at page 86 of this printed record.

Mr. Menzies: I don't see in the exhibit file, your Honor, the adjuster's agreement. Do you have that, Mr. Sadicoff? This appears to be a copy. Do you have the original, Mr. Sadicoff, or do you desire to keep the original?

Mr. Sadicoff: That is an executed copy. Let me go through here. I might find another copy. As far as I am concerned it can be admitted. I think the original was taken by Senator Claghorn.

Mr. Menzies: It was?

Mr. Sadicoff: Yes.

Mr. Menzies: Well, let us get a better copy. I will offer in evidence an adjuster's agreement between the plaintiffs and the Jim Dandy Markets, bearing the date of the 9th of April, 1947, and ask that that be marked Exhibit 11 in evidence.

Mr. Davis: To which the defendant Fireman's Fund objects on the grounds previously stated in the objections, and on the further ground it is not binding on the defendant Fireman's Fund.

The Court: Objection overruled. It will be received in evidence. [39]

(The document referred to was marked Plaintiffs' Exhibit 11, and was received in evidence.)

[Plaintiffs' Exhibit No. 11 set out in full, page 193 of this printed Transcript of Record.]

Mr. Menzies: May it be stipulated, your Honor, between the parties that with relation to the documents that have been received in evidence that they

were executed and delivered on or about the dates that they bear?

Mr. Sadicoff: I will, excepting that exhibits 9 and 10, being the bill of sale and the assignment of lease, it is my understanding that they were executed actually on July 27th, 1946, which was the same date that the escrow instructions were signed.

Mr. Menzies: I believe they bear that date, Mr. Sadicoff, as I recall looking at them here but—

Mr. Watt: 9 and 10 both bear the date of June 27th.

Mr. Sadicoff: I will make sure.

Mr. Menzies: That is the last two exhibits.

Mr. Sadicoff: So stipulated.

Mr. Thomas: With this reservation—delivery was into escrow of those instruments.

Mr. Sadicoff: That is right.

Mr. Thomas: Only into escrow.

Mr. Menzies: Very well. May the record show it has been stipulated that all of the documents with the exception of Plaintiffs' Exhibits 9 and 10, were executed between the parties named therein, on or about the dates they bear and [40] were delivered; that as to Exhibits 9 and 10 it will be stipulated that they were executed on or about the date that they bear but were delivered to the Morrison Escrow Company. Is that satisfactory?

Mr. Thomas: That is correct.

Mr. Sadicoff: That is satisfactory excepting that with respect to—I misstated myself before with respect to Exhibit 7, supplemental and modified agreement which bears date of June 12th, 1946. That

actually was, as I understand it, executed on or about the 27th day of June, 1946, at the same time that the bill of sale and the escrow instructions were executed.

Mr. Menzies: I have no knowledge of that. That is something we might like to offer proof on, but at least they were executed by the parties. May that be stipulated?

Mr. Sadicoff: That we will stipulate.

Mr. Menzies: And leave the dates open.

Mr. Sadicoff: Yes.

Mr. Menzies: Is that satisfactory to all concerned?

Mr. Thomas: Yes. I don't know about that date he is mentioning and I don't quite see the significance of it—the two weeks difference.

Mr. Menzies: May I ask for this stipulation, your Honor, with relation to the escrow? That the completion, if any, of the escrow took place after the fire? [41]

Mr. Sadicoff: What do you mean by "completion of the escrow?"

Mr. Menzies: Well, insofar as it affects the property involved in this litigation—that is, the Atlantic Market, that the payments of some \$27,400 were paid into the escrow after the fire.

Mr. Sadicoff: Well, I assume, Mr. Menzies, that you will stipulate and I offer this as an amendment, because I think I am going to stipulate to what you say, but in order to get the chronology of it correct, that as of the date of the fire the Jim Dandy Market was not in default in any of the pay-

ments required of it to be made to Mr. Smith. Is that so stipulated?

Mr. Menzies: I have no knowledge of that.

Mr. Thomas: I will so stipulate.

Mr. Menzies: You will have to get a stipulation from Mr. Thomas.

Mr. Sadicoff: May I have that stipulation?

Mr. Thomas: Yes.

Mr. Menzies: Have you got the checks you gave?

Mr. Sadicoff: Is it stipulated that on March 20th, 1947 there was delivered to the Morrison Escrow Company two checks, one in the sum of \$20,000 and one check in the sum of \$17,000 for Mr. Smith and in full payment of the amount due for the so-called Atlantic store? [42]

Mr. Thomas: I would prefer putting that letter in under which that was done, which gives a full recital of the facts rather than just to take the conclusion.

Mr. Sadicoff: I have no objection to putting in the entire letter.

Mr. Menzies: Give it to me please. Do you want to put it in now or later, Mr. Sadicoff?

Mr. Thomas: I think we may gain some time by talking this over after recess and go ahead with the rest of them now.

Mr. Menzies: I am just about finished, Mr. Thomas.

Mr. Sadicoff: Will you stipulate, Mr. Thomas and Mr. Menzies, that on August 1st, 1947 the full balance that was due under the supplemental and

modified agreement was paid by Jim Dandy Markets into the escrow?

Mr. Thomas: It is subsequent to the payment and the withdrawal of the documents as to the Atlantic Market, and while it is just a matter of putting in a lot of surplusage I will object to it as not being pertinent to the Atlantic store. The papers were withdrawn and paid off prior to that date. I am not sure of the dates there and I don't question that they are correct because it has all been paid off.

Mr. Sadicoff: Do you contend that we at any time were in default in our payments?

Mr. Thomas: No.

Mr. Sadicoff: Either prior or subsequent to the fire? [43]

Mr. Thomas: No, I am not making that point at all.

Mr. Sadicoff: You admit, then, that we were not in default?

Mr. Thomas: I have so stipulated.

Mr. Sadicoff: Do you so stipulate, Mr. Menzies?

Mr. Menzies: Whatever the record shows. I have no connection with that. I am not affected by it other than this, your Honor, that the payments were not made until after the fire. Insofar as your cross bill and the answer thereto is concerned I don't believe that that affects us materially and I don't think I am a party to that situation.

I will not raise any objection, however, to it being placed in evidence if opposing counsel, insofar as the cross bill is concerned, desire it.

The Court: I think it should go in at this place to keep the continuity so we will know what the factual situation is relating to the particular document.

Mr. Menzies: I understand from the discussion here in court there was some letter that accompanied that payment. I believe if that is true then the original letter should be introduced in evidence, together with the checks and that would perhaps clarify the situation.

The Court: All right.

Mr. Menzies: Do either of you gentlemen have the original letter? [44]

Mr. Sadicoff: No.

Mr. Thomas: It is with the escrow company. I have a copy submitted by them.

Mr. Sadicoff: And which we admit. Will you take our word for it, Tom?

Mr. Menzies: That is satisfactory, too. We will offer that exhibit which it attached to the demand for admissions which was presented by Mr. Smith.

The Court: All right.

Mr. Menzies: We will offer that in evidence.

The Court: Where is it?

Mr. Thomas: I am taking it apart.

The Court: Did they include it in the answers to the demands?

Mr. Menzies: No, they did not.

Mr. Thomas: It is not in the pleadings. I will offer in evidence, your Honor, a letter bearing the date of the 20th of March, 1947, addressed to the Morrison Escrow Company, signed by Jim Dandy

Markets, Inc., by Charles Schuster, president. It apparently went by registered mail and I ask that that be marked Exhibit 12.

The Court: It will be admitted.

(The document referred to was marked Plaintiffs' Exhibit 12, and was received in evidence.)

[Plaintiffs' Exhibit No. 12, set out in full, page 204 of this Transcript of Record.]

Mr. Menzies: And I believe there is a reply thereto. [45]

The Court: All right.

Mr. Menzies: I want to get one more exhibit that is attached to the answer of E. F. Smith.

Mr. Sadicoff: June 1945?

Mr. Menzies: No, the 1st day of July 1945.

The Court: My Clerk calls my attention to the fact that this case has never been officially transferred out of Judge Hall's court. We have a rule which requires a written transfer and my Clerk called my attention to the fact that it has never been transferred, either to Judge McCormick or myself and the only minute order here is the one I made on March 22nd, so I am going to have a regular form prepared. This is a matter between the judges. This carries a BH number and was transferred and re-transferred, so we will finally transfer it here, its final home.

Mr. Sadicoff: Just so long as the clerk doesn't oust us because of jurisdiction.

The Court: We have to observe these things, otherwise we have to carry the minutes under the name of either Judge Harrison or Judge Hall.

Mr. Menzies: I will offer in evidence Exhibit A which is attached to the answer of F. E. Smith to the complaint, in which documents captioned "An Agreement," and bears the date of the 1st day of July, 1945, between E. F. Smith, parties of the first part, Charles Schuster, Leo Goldberg, Earl I. Swetow, Max M. Berick, and Norman Schuster, co-partners. [46]

The Court: Is that the original agreement or supplemental agreement?

Mr. Menzies: That is the original.

The Court: Exhibit A?

Mr. Menzies: That is right.

The Court: Very well.

Mr. Menzies: Ask that be marked Exhibit 13.

The Court: It will be received.

(The document referred to was marked Plaintiffs' Exhibit 13, and was received in evidence.)

[Printer's Note]: Plaintiffs' Exhibit No. 13 is attached to Answer of E. F. Smith as Exhibit A and is set at page 27 of this printed record.

Mr. Thomas: That is Exhibit A to the complaint?

The Court: Yes, I have it. Do you want the supplemental—

Mr. Menzies: I believe the supplemental is in there under Exhibit 7.

Mr. Sadicoff: That is Exhibit 7.

Mr. Menzies: That was attached to 7.

The Court: I wanted to make certain. I haven't

looked at the contents. Then, gentlemen, the original agreement remains as Exhibit 13.

Mr. Menzies: There is one other stipulation, your Honor, that I would like to ask for at this time, and that is that the parties named in the last exhibit, constituting the partnership of the Jim Dandy Markets, were the predecessors in interest of the Jim Dandy Markets, Inc., a corporation. Do [47] you so stipulate, Mr. Thomas?

Mr. Sadicoff: What is that? Oh, yes, I will so stipulate.

Mr. Thomas: Yes.

Mr. Menzies: I think that is all, your Honor, in the way of exhibits.

The Court: Are you going to offer any more evidence?

Mr. Menzies: No. I believe, your Honor, that we have made a prima facie case and will rest and I believe the other parties have some evidence.

The Court: You mentioned something about an escrow man being here and I assumed all you wanted of him was to identify some documents. We shouldn't keep him here. He hasn't any interest in the litigation. It occurred to me perhaps we could get him out of the way if you call him to the stand to identify whatever you have in mind.

Mr. Menzies: That may have been my error. There were some escrow instructions in the hands of an agent whom I didn't know and I assumed they were, perhaps, from the Morrison Escrow Company. I have been informed to the contrary.

The Court: I wanted to accommodate the par-

ties who are interested in the litigation and let them be on their way as quickly as possible. If not, this is a good time to take our adjournment. Let me ask you gentlemen as to the manner in [48] which you desire to proceed.

Ordinarily we have followed the usual manner. The defendant would be allowed to present such testimony under his answer as he deemed proper and then the burden would shift to the cross complainant on his affirmative claim for reformation on the ground of mistake. Unless the issues in the case are such that you desire to vary that order I would be inclined to think we should follow it because it is the usual one. What do you say about that?

Mr. Thomas: That is all right.

Mr. Sadicoff: I think upon plaintiff resting—

The Court: They have rested.

Mr. Sadicoff: Then it occurs to me that it would then probably be the best way for the defendant Smith to proceed on his cross claim, on the reformation, because if your Honor should hold, for instance, that he is not entitled to reformation, then that would practically end this lawsuit as far as Smith is concerned and then the Jim Dandy Markets would be entitled to, unquestionably, to a judgment on the policies that we hold and issued by the plaintiffs in this action.

The Court: Well, gentlemen, there are two objections to that procedure. The first one is that this is a final trial. The second is that under the

rules which went into effect on the 19th of March, findings are necessary on the motion for dismissal or motion for nonsuit. That has now [49] become the law and it is required that if the court dispose of any matter on a motion to dismiss on the merits, findings be made.

That rule was announced by the Circuit Court for the Ninth Circuit in what is known as the Harvey case.

That being the case, gentlemen, it has been my attitude that if you are going to make findings you might as well hear all the testimony and on the basis of that testimony prepare findings, because it is very difficult to make findings upon a one-sided matter. I do not want to stand in the way of counsel making a proper motion to preserve his record, but I feel that all the issues in this case should be decided upon their merits after a full hearing of all the testimony and only after all the testimony is in should the court determine any of the issues rather than allow or ask Mr. Smith to make a *prima facie* case and then rule upon the matter. If we did that I would still prefer to deny the motion for the reason that if the motion is well taken then I can render a judgment on the merits after contradictory testimony such as you may choose to introduce is in, and if you feel that the testimony which may be offered by Mr. Thomas on behalf of his client is legally insufficient then you can decline to introduce testimony on the matter and rest upon his testimony, and then when all the evidence is in

argue the question as to whether the testimony is [50] legally sufficient.

I do not know the nature of the claim of mistake. Of course I am familiar with the law. I looked at my notes and I found some leading cases on the subject of reformation, which I have accumulated in my black book, with which all of you are familiar. Some of them refer to it as my black Bible, because for years I have referred to it and accumulated cases dealing with the things that come up in our courts. And of course this being governed by a State law I had to refer to State citations.

I noticed later on by glancing at the briefs, that the leading case on the subject is cited by yourself and that is the case in 175 California, *Harding vs. Robinson*, written by Judge Henshaw, which lays down the rule as to what type of mistake may be cured by reformation, and I presume you all agree it must be a mutual mistake, a mistake known to both parties or a mistake induced by fraud against the other side. So, I would prefer that all the testimony be put in, whether by way of defense or by way of defense to the cross claim, so I may determine the matter on its merits.

In Federal Rules Decisions 1, page 301, there is the following language:

“The granting of relief is discretionary. But the discretion is a judicial discretion. The court cannot refuse to exercise it when facts warrant its exercise. This would constitute an abuse of discretion which, like other [51] abuses of discretion, is reviewable.”

And under that are cited several Circuit Court cases, one from the Fourth Circuit, 92 Fed. (2d) 321; one from the Seventh Circuit, 103 Fed. (2d) 613; and one from the Sixth Circuit, 102 Fed. (2d) 104. Another one from the Sixth Circuit in 109 Fed. (2d) 690.

The reason I am referring to this is because the only way you can exercise discretion—you can determine to exercise discretion is to have all the facts before you and especially when there is a cross claim.

The object of the procedure is not attained unless we dispose of all the issues and you can't do it unless all the facts are before me. I am not foreclosing you from making any motion you desire but we will have to have all the facts brought out. I am merely suggesting that the better way would be for you to introduce whatever evidence you have and then have Mr. Thomas introduce evidence on the reformation and then you will reply, and then Mr. Menzies and Mr. Watt will have an opportunity to cross examine your witnesses insofar as they affect their rights in the matter.

Mr. Sadicoff Your Honor, I perhaps unhappily stated my position. I think that with the introduction of the evidence by the plaintiff that, in my humble opinion, a prima facie case has been established for recovery by Jim Dandy Markets upon the policies of the plaintiff. Then I thought that [52] the logical way to proceed was for Mr. Thomas to proceed in connection with his evidence on the cross claim. That is all I had in mind.

The Court: I will dispose of it in this manner, then: Will you state that so far as the complaint is concerned and the answer, that you are offering no evidence because the position you take relates merely to an interpretation of the meaning of the documents introduced, so far as they relate to the insurance policy?

Mr. Sadicoff: Yes.

The Court: Will you so state?

Mr. Sadicoff: Yes.

The Court: And that you have no additional evidence, either oral or documentary, to offer under your answer to the complaint?

Mr. Sadicoff: That is right.

The Court: That settles the whole thing. We have wasted a lot of time.

Mr. Sadicoff: Mr. Davis asked a question as to whether the record shows that we made proof of loss and that the conditions required of us to be performed, were performed, and we have a stipulation to that effect.

Mr. Menzies: Your Honor, there is an adjuster's agreement, and as your Honor is familiar with the Rule that where there is an agreement then proof of loss is dispensed with. [53] We raise no defense.

The Court: You are raising no question as to failure to comply with the requirement within the time provided by the policy or any extension thereof?

Mr. Menzies: That is right. There is an adjuster's agreement. We couldn't raise it. But I

don't want the court to understand that that goes to the question of coverage.

The Court: No; it merely complies with the conditions precedent and that is the presentation of the claim.

Mr. Menzies: That is right.

The Court: All right. Then when we reconvene Mr. Thomas is going to have the laboring oar under his cross complaint. We will recess until two o'clock p.m.

(Whereupon, at 12:50 o'clock p.m., a recess was had until 2:00 o'clock p.m. of the same day.)

Los Angeles, California,

Friday, April 9, 1948—2:00 p.m.

The Court: All right, gentlemen, you may proceed.

Mr. Thomas: If the court please, on behalf of the cross complainant Smith, I first offer a copy of a sub-lease between E. F. Smith and Charles Schuster and the other parties named before, under date of July 1, 1945.

As to form it has been agreed this is a correct copy of the one and that the original was delivered at that time. Is that so stipulated, Mr. Sadicoff?

Mr. Sadicoff: That is the copy of the sub-lease on the so-called Atlantic store?

Mr. Thomas: Yes.

Mr. Sadicoff: So stipulated.

Mr. Thomas: Also I would like to call attention to the fact that this sub-lease calls attention to two exhibits which it refers to as A and B, and which

are the original leases, which are already in evidence, and therefore have been detached from the sub-lease so as not to encumber the record by duplication of the same documents.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

Mr. Menzies: How are those exhibits numbered, do you recall?

Mr. Sadicoff: They are 5 and 6. [55]

The Clerk: This is Defendants' Exhibit A in evidence.

Mr. Davis: No, the Cross Complainants'.

The Clerk: Mr. Smith is the defendant in the case.

Mr. Thomas: That is correct.

The Clerk: Then it will be designated Defendant Smith's Exhibit 1.

Mr. Menzies: That will be Defendant Smith's Exhibit A, is that correct, Mr. Clerk?

The Clerk: Defendant Smith's Exhibit A, dated July 1, 1945.

(The document referred to was marked Defendant Smith's Exhibit A, and was received in evidence.)

[Defendant Smith's Exhibit "A" set out in full, page 195 of this printed Transcript of Record.]

Mr. Thomas: The sub-lease also refers to Exhibit C, which is an inventory and which I will offer as the inventory which was taken of the fixtures and equipment in accordance with that sub-lease.

Mr. Sadicoff: July 1945?

Mr. Thomas: That is right. I offer that in evidence as Smith's exhibit next in order.

The Court: Admitted.

The Clerk: Defendant Smith's Exhibit B in evidence.

(The document referred to was marked Defendant Smith's Exhibit B, and was received in evidence.)

[Defendant Smith's Exhibit B set out in full, page 207 of this printed Transcript of Record.]

Mr. Thomas: Mr. Sadicoff has agreed to stipulate to some general facts rather than put in a lot of evidence and that is, [56] first, that the assignment of the lease which is now in as Plaintiffs' Exhibit 10, and is the assignment of the lease referred to as the Atlantic Market, which is in the same form as the assignment of leases which were signed in the other markets, that is, the Ontario, the 6th Street, and the Watts store under the same agreement except as to different names of the stores and locations and dates and which were made at the same time, and all of which were made under the original agreement, which is in as Plaintiffs' Exhibit 13. Is that correct, Mr. Sadicoff?

Mr. Sadicoff: Yes. And also I assume you will be willing to add to that stipulation that those assignments were drawn by the attorney for Mr. Smith?

Mr. Thomas: I understand they are on his paper. I asked him to be here but he begged off until the morning and I think we will have to get it clear from him, whether he wrote them originally

or whether there were some negotiations as to form. They were drawn and were on his paper—the one I put in is on his stationery, and so far as his seeing it and putting it out, I will accept the stipulation, but I have the impression there was some—what it was I don't know.

Mr. Sadicoff: Are you willing or are you unwilling to stipulate that they were drawn by the attorney for Mr. Smith?

Mr. Thomas: Unwilling as a complete statement of what happened, but that they were written on his paper is obvious [57] from the copy and photostat. They are on his stationery.

Mr. Sadicoff: So stipulated.

Mr. Thomas: And it is next stipulated that the sub-lease put in evidence just now as Defendant Smith's Exhibit A, is a sub-lease which Exhibit 8, the answer of the defendant Jim Dandy Markets—in other words, the one that was drawn in accordance with and under that Atlantic lease—sub-lease, the Atlantic Market which is—no, that isn't right.

Mr. Sadicoff: The document speaks for itself, Mr. Thomas.

Mr. Thomas: Well, it probably does. I will withdraw that. In the bill of sale, which is Plaintiffs' Exhibit 9, the bill of sale refers to an inventory attached to a sub-lease, and I understand it is stipulated that the inventory put in as Defendant Smith's Exhibit B, is the inventory referred to in that document.

Now, there are no dates on the inventory that

identify it except by that stipulation as being the one referred to. That is why I think a stipulation there is in order. Will that be stipulated? That that is the only one they have had at the Atlantic store as between the parties?

Mr. Sadicoff: No, because of the fact that—well, that might be true excepting, of course, I don't want to be foreclosed from contending that the assignment carried with it the assignment of the leases on the Atlantic store, carried [58] with it any rights that Mr. Smith had in the building.

Mr. Thomas: All I am asking for is an identification of the document.

Mr. Sadicoff: As to that, we will stipulate as to the document.

The Court: Counsel can't stipulate to what inferences you want to draw from it. He is merely stipulating that this is the document in the way of an assignment, isn't that true?

Mr. Thomas: That is correct.

The Court. What legal effect it has is a matter for the court to determine after argument.

Mr. Sadicoff: That is right.

Mr. Thomas: I am just tying the documents in together.

Mr. Sadicoff: Okay, so stipulated.

Mr. Thomas: I may have covered this one. I put in Smith's Exhibit A but to be sure the original sub-lease, Defendant's Exhibit A, was delivered to the defendants' predecessor at the time it was drawn.

Mr. Sadicoff: So stipulated.

Mr. Thomas: Call Mr. Smith.

But before starting the examination of Mr. Smith, your Honor, I might state that after all there a lot of things that have been covered and that are in these documents. I think your Honor, however, has been alert enough and is [59] alert enough with the extent of it to try it and—

The Court: I have had an opportunity to examine the pleadings since this morning more carefully, and the cross claim pleads in very simple language just one fact. I commend you on the brevity of it, Mr. Thomas. It only covers three pages, and it merely says that in executing the assignment it was not the intention to convey any interest in the building. That being true, I believe your testimony should be limited to that fact.

Mr. Thomas: That is my intention, your Honor.

The Court: Unless there is something not appearing on the face of the other documents which would throw light upon what was done before this.

Mr. Thomas: You have anticipated what I was concerned with. In other words, this testimony might appear too limited at first, but my idea is to go to the thing we are talking about.

The entire configuration of the transaction appears from the documentary evidence which is already in evidence, and so far as the main suit is concerned counsel for the plaintiffs and the defendant Jim Dandy Markets at least, without our back-seat rider, Mr. Davis, have agreed that so far as

their litigation is concerned, all the elements, factual elements upon which it is to be decided are contained in those documents. So, the only thing that remains for us [60] at the present time is to supplement it by any evidence which goes to the allegations of this cross bill, as I have already stated. So, there is no need to go into any prior negotiations or anything else, but confine ourselves to the narrow allegations of the cross claim.

The Court: When your testimony is in then, of course, you can argue the entire field—the entire field is open to you, because, as I said before, those exhibits, whether you adopted them or not, are before the court for whatever inference may be drawn, favorably to you or unfavorably to you, just as they are to every other litigant in this lawsuit.

Mr. Thomas: Mr. Smith, will you take the stand?

E. F. SMITH,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The clerk: State your full name.

The Witness: E. F. Smith.

Direct Examination

By Mr. Thomas:

Q. Mr. Smith, you are the defendant E. F. Smith, named in this action? A. Yes.

Q. Mr. Smith, did you conduct the negotiations for the sale of your chain of markets which have

(Testimony of E. F. Smith)

been referred to in [61] the talk here in court today, and as set out in the contract which was executed on the 1st day of July, 1945, introduced here as Plaintiffs' Exhibit 13? Do you remember that document?

A. Mr. Thomas, I didn't get what you said right at the start. I am a little bit hard of hearing.

Q. Did you personally conduct—

The Court: If Mr. Smith is hard of hearing I have no objection to counsel sitting opposite Mr. Sadicoff.

Mr. Sadicoff: And I have no objection to his sitting there.

The Court: Sometimes, but very rarely in this court, I have to keep attorneys far apart from each other. I don't think there is that danger between you two gentlemen.

Mr. Thomas: No, I don't think so, either. It was the length of my question, rather than my voice that caused him not to hear me.

Q. By Mr. Thomas: I asked you if you negotiated or, rather, handled the negotiations yourself or was it done through an agent?

A. Why, the negotiations were through, I guess you would say, an agent—Mr. Johnston. In other words, the whole transaction was discussed between myself and Mr. Johnston, and then between Mr. Johnston and the parties that were buying.

Mr. Menzies: Will you please keep your voice up? [62]

(Testimony of E. F. Smith)

Mr. Thomas: I think maybe he will talk louder.

The Witness: Shall I repeat that again?

The Court: I think the reporter can read it.

(Answer read.)

The Witness: May I correct that statement in one small point?

Mr. Thomas: Yes.

A. Mr. Schuster approached me one time at the Hollywood race track, several days prior to the real negotiations of the transaction, and more or less outlined his idea of purchasing the markets instead of letting them run the nine years. We only discussed it for a matter of about, approximately ten minutes between races, and then he said he would take it up and explain his ideas thoroughly to Mr. Johnston, and that Mr. Johnston would contact me, which he did later on.

Q. By Mr. Thomas: Is Mr. Schuster the only one of the persons who were then partners—Mr. Schuster, Goldberg, Mr. Berick and Mr. Norman Schuster—those are the people who are named in the first sale as a co-partnership of the Jim Dandy Markets. And did you talk to any one of those people other than the conversation you just referred to with Mr. Schuster?

A. In regard to the purchase instead of the original agreement? [63]

Q. No, I am talking now about the original agreement.

(Testimony of E. F. Smith)

A. The original agreement?

Q. Was the reference that you just made to the original agreement or the second agreement?

A. No, to the modified agreement. I misunderstood you.

Q. Now, let us go back to the first agreement. Did you talk to any of them at that time?

A. No, sir.

Q. At no time at all until after the agreement was signed?

A. The entire agreement was handled through Mr. Johnston as far as I was concerned, outside of my attorney drawing the papers.

Q. Now, when did you first hear a suggestion of modifying the agreement?

A. I just answered that statement.

Q. That was the one you just referred to?

A. Yes.

Q. And about what date was that?

A. Well, I would say that would have been about 11 months later—no, the first agreement—that was probably a month prior to the second agreement or the modified agreement.

Q. In other words, the second agreement was executed [64] during the month of June, 1946. The first agreement was executed the first day of July, 1945, so this conversation was sometime around the 1st or shortly prior to the 1st of June, 1946, would you say?

A. Well, not more—I mean not earlier than that

(Testimony of E. F. Smith)

time. My memory is a little vague, but it was prior to that time—a matter of perhaps two weeks or perhaps three weeks. I don't know. He brought the subject up to me and later on Mr. Johnston approached me about it.

Q. Was there any conversation at that time relative to changing the agreement other than the changing to a purchase agreement instead of a lease?

A. At the time when Mr. Schuster spoke to me you mean?

Q. Yes.

A. No, the main topic of our conversation was at that time in regards to how much tax I would have to pay if I sold the markets. That was practically the whole topic of the conversation between myself and Mr. Schuster at that time.

Q. You mean because if you got it all at once instead of spreading it over the years?

A. He informed me I could take it on a long term capital gain and wouldn't have to pay so much tax.

Q. Was anything mentioned about what would be sold—what was the subject matter of the sale?

Mr. Sadicoff: Just a minute. That is objected to upon the ground it is incompetent, irrelevant and immaterial and leading the witness.

The Court: I think that is permissible. It is merely to direct his attention to the topic. That should be answered yes or no and then it should

(Testimony of E. F. Smith)

be followed by another question unless you want to explain your answer.

The Witness: If I am permitted to answer this in my own way. I would say that yes or no wouldn't answer the question.

The Court: I know that, but the main point is this: If you answer yes, then Mr. Thomas will follow it up and ask you when the conversation took place and who was present and so forth. That is the point. I am not trying to hold you down to answering it yes or no. We are judges and not investigating committees, you see, and we have certain rules that we observe. The only object of asking you to answer yes or no is because if you answer yes he had to lay a foundation, as we call it; and if you answer no then the matter is at an end. So you will answer the question either yes or no and then Mr. Thomas will follow it up.

The Witness: Yes.

Mr. Thomas: Will you read the question? I have even forgotten it myself.

(Question read as follows: [66])

“Q. Was anything mentioned about what would be sold—what was the subject matter of the sale?”)

A. Yes, as I recall the conversation.

Q. (By Mr. Thomas): Just a minute. Your answer is yes? This happened where, did you say?

A. At the Hollywood race track.

(Testimony of E. F. Smith)

Q. Who was there present? I mean by that in your circle of conversation?

A. Mr. Schuster and myself.

Q. And about what date?

A. I will say some time the latter part of May. I am unable to say what date it was.

Q. What was said?

Mr. Sadicoff: That is objected to.

The Court: May of 1946?

The Witness: 1946, yes.

The Court: All right.

Mr. Sadicoff: That is objected to as incompetent, irrelevant and immaterial and not within any issue in this case, and because it is an attempt to vary the terms of the agreement that was finally consummated.

Here is a conversation that took place long before and which he says was finally worked out by his agent and not by him.

The Court: But where you seek to reform an instrument [67] the court has the right to go behind the instrument because otherwise there would be no occasion for seeking a reformation.

Of course, there is no claim of ambiguity in this case. It is claimed that a certain provision did not correctly represent the intention of the parties. In other words, a mutual mistake as I gather it. So, the rule which applies ordinarily to written instruments does not apply to this situation because this is one of the few situations where a person may go behind the instrument in order to show that the

(Testimony of E. F. Smith)

instrument did not express the true intention of the parties.

What effect is to be given to his testimony is a different proposition. That goes to the weight of it but not to the admissibility of it. Objection overruled.

The Witness: The conversation was very limited in regards to the markets. He just asked me what my thought would be in regard to exercising the option now instead of nine years later on. And I will say that he only referred to them either as the equipment or the markets. That is all that I will say the conversation was in regards to.

The Court: Was the lease referred to? You mean nine years was the balance of your lease?

The Witness: The balance of the lease at that time before the modified agreement. [68]

The Court: All right.

Q. (By Mr. Thomas): And the option he referred to was the one that at the end of the 10-year lease—

A. At the end of the 10-year lease, yes, sir.

The Court: As I gather it then, up to that time they merely had a sub-lease, is that true?

Mr. Thomas: That is correct.

Mr. Sadicoff: With the option to purchase at the end of ten years.

The Court: And this conversation relates to the changed agreement whereby they exercised the option sooner than provided in the original agreement, is that correct?

(Testimony of E. F. Smith)

Mr. Thomas: That is correct.

The Court: All right.

Q. (By Mr. Thomas): Did you thereafter and prior to the execution of the modified agreement talk to any one of these partners?

A. No, sir.

Q. Who conducted the negotiations for you?

A. Mr. Johnston.

Q. Did you at any time ever talk to any of the purchasers or their agents about the building situated on the Atlantic Market site?

A. I did not.

Q. In calculating the price which was negotiated between [69] you did you figure the value of the building?

Mr. Sadicoff: Objected to as incompetent, irrelevant and immaterial, and self-serving, and calling for a conclusion of the witness, and what was in his mind.

The Court: In view of the fact that price was not discussed by him, what he told his agent in regard to the price or the matter of calculation is not material unless the agent communicated that. Suppose the agent disobeyed his instructions and didn't communicate that. It is quite apparent that he did not carry on the negotiations. He merely was approached and then dealt through his agent. Therefore, any communication to the agent is not permissible unless you assure me that you intend to follow it up and show that he did so tell Mr. John-

(Testimony of E. F. Smith)

ston, and Mr. Johnston informed Mr. Schuster or somebody.

Mr. Thomas: I couldn't tell you that. I don't think I can bear that out.

The Court: You can't reform an instrument on an unexpressed thought in a man's mind.

Mr. Thomas: I didn't mean it in the sense that it is being approached and on the sense you are expressing it. I think you are absolutely right. The question is improper. I was trying to shortcut—find a shorter way to the subject matter.

The Court: And I like shortcuts as much as any judge. [70]

Mr. Thomas: The implications you are putting in I agree entirely with.

The Court: There are implications there, all right.

Q. (By Mr. Thomas): In your conversations with Mr. Schuster was the building mentioned?

A. No, sir.

Q. Did you at any time—I will withdraw that. Take the witness.

The Court: Let me ask one question, Mr. Sadi-coff, before you begin.

Could you tell us in your own words the substance of the conversation with Mr. Schuster? Did he use the word "option" or did he use the word "lease" when you say that he told you that he wanted to exercise the option? How did he express himself? Did he say, "I want to take up the option

(Testimony of E. F. Smith)

now," or "I want to take the lease over now and pay you out," or how did he put it?

The Witness: Your Honor, that is quite some time ago and it is hard for me to say exactly how he expressed himself.

The Court: I want the substance of it.

The Witness: The general substance and the meaning was that they would like the option called for \$192,500 at that time, and not continue to pay rent—only on the real property that I owned, and buy the equity at that time. That is what I gathered from his conversation. [71]

Mr. Sadicoff: I move to strike out what he gathered from the conversation unless he discloses—

The Court: You mean that is the substance of it?

The Witness: Yes, sir.

The Court: Well, was the word "option" used or did he say, "I want to take over the lease now." What did he say?

The Witness: The lease was never mentioned. He either spoke of it as markets or the operation.

The Court: Markets or the operation? But the original agreement related—strike that. You had the leasehold on that particular market, didn't you?

The Witness: I had a ground lease.

The Court: All right, go ahead.

Cross Examination

By Mr. Sadicoff:

Q. Mr. Smith, who was your lawyer?

A. Mr. Cassidy, Tom Cassidy at that time.

(Testimony of E. F. Smith)

Q. You had no conversations with anybody with respect to your leases or of the equipment other than with your agent and with Mr. Schuster at the race track in the summer of 1946, isn't that right?

A. That is right.

Mr. Sadicoff: That is all.

The Court: Any redirect?

Mr. Thomas: Maybe the other parties would like to [72] question him.

The Court: Mr. Menzies?

Mr. Menzies: No questions.

The Court: Mr. Davis?

Mr. Davis: I am not in the cross complaint; I don't know where I am.

The Court: You are not in at all.

Mr. Davis: I just can't find it.

Mr. Thomas: Mr. Johnston.

JAMES R. JOHNSTON,

called as a witness by and on behalf of the Defendant Smith, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: James R. Johnston.

Direct Examination

By Mr. Thomas:

Q. What is your business?

A. Real estate broker.

Q. And were you a real estate broker in 1945 and 1946? A. Yes, sir.

Q. Where are your offices located?

(Testimony of the James R. Johnston.)

A. 2620 South Avenue, Huntington Park.

Q. And at that time also? [73]

A. Yes, sir.

Q. At the times referred to in the instruments which you have heard referred to in the courtroom, in this trial, during all those times your office was at that address?

A. Yes, since July 1st, 1945, that has always been my office.

Q. You heard Mr. Smith's testimony that his agent, Mr. Johnston, conducted the negotiations. Are you that Mr. Johnston? A. Yes, sir.

Q. To whom did you first talk concerning the original agreement, and just to be sure I am taking this chronologically back at the first, Mr. Johnston, and not the second. Keep your mind on the first one. To whom did you first talk about the first agreement?

A. The agent for the Jim Dandy Markets. He approached me. Do you want me to go further?

Q. I am not asking for the conversation. I just want you to tell me what happened so that we will get our bearings on any conversations when they are proper to be given.

The Court: Fix the time so we may be certain that we are talking about the negotiations which preceded the making of the original sub-lease, and not the modification. Do you understand that?

The Witness: Yes. That would be in June of 1945 at [74] Mr.—the Jim Dandy Markets' agent first approached me relative to the purchase of those markets for Jim Dandy.

(Testimony of the James R. Johnston.)

Q. And did you then conduct negotiations as Mr. Smith's agent?

A. Well, I first got in touch with Mr. Smith, with whom I had been in touch for perhaps two or three weeks, and he told me he would consider selling them under certain conditions.

Q. And you proceeded to negotiate the transactions? A. Yes, sir.

Q. Now, do you know the partners in the Jim Dandy Markets? A. Yes, sir.

Q. Did you talk to any of them?

A. All of them, I believe.

Q. At different times? A. That is right.

Q. About the negotiations?

A. That is right.

Q. At any time during any of these conversations did you talk about the building situated on the Atlantic Market site?

A. The only time that the buildings were mentioned was in Judge Cassidy's office. That is prior to the fire, if I can put it that way. [75]

Q. Well, we are talking about prior to the first agreement, prior to July 1, 1945.

A. Yes. They were the original leases on the Atlantic and all of the other markets. They were produced in Judge Cassidy's office when the co-partners met there to discuss the drawing of this agreement.

Q. Who were present at that time?

A. I believe all of the co-partners, Mr. Russell, Judge Cassidy and myself.

(Testimony of the James R. Johnston.)

Mr. Sadicoff: Pardon me, Mr. Thomas. As I understand, that was in June of 1945?

Mr. Thomas: That is right. That is my understanding.

The Witness: That is right.

Q. (By Mr. Thomas): You say there was some conversation relative to buildings?

A. Well, only this, that all of the leases were produced so that the co-partners could examine them and the leases mentioned on the Atlantic and other markets, Ontario, that they were on leased ground and that the buildings were put on by the lessee and could be removed by him.

Q. Who mentioned that?

A. I am not sure who first mentioned it, but Mr. Goldberg and Mr. Swetow discussed the matter, that they were Mr. Smith's buildings; that he had built them on the leased ground. [76]

Q. Was that discussed with all the parties in on that conversation? Was that where everybody was listening to somebody else? A. I suppose so.

Q. Did you have any conversation relative to the buildings at that time?

A. None other than the fact that they were built on leased ground.

Q. Did you at any other time, and now again confining ourselves to the agreement of July 1, 1945, and prior to that or at the time of its execution, have any further or other conversation with any of the parties or their agents relative to the buildings on these grounds? A. No, sir.

(Testimony of the James R. Johnston.)

Q. Did your negotiations include negotiations of price? A. Oh, yes.

Q. Who did you discuss about price with?

A. Well, I talked to Mr. Russell first, who was

Q. No, I am talking about the Jim Dandy people.

A. Well, I talked to Mr. Russell first, who was their agent, and speaking now of the first agreement—

Q. That is all?

A. There wasn't any contention over price. If I can explain it this way? Mr. Smith had been negotiating with another party and he established with them a price of \$200,000, [77] which price he was willing to sell at to Mr. Russell's client and that information I gave to them.

Q. And it was on the basis of that price that the agreement was closed?

A. That is right, the price of \$192,500 is the same price, because they paid \$7,500 for trucks and so on in cash.

Q. In other words, there was just a change in the method of payment ending up in that price?

A. That is right.

Q. During that negotiation or conference was there any discussion between you, by you with any of the Jim Dandy Market partners or their agents, relative to the price including the building?

A. No, sir.

Q. Now, did you have any discussion with any of the partners—I will withdraw that. When, after

(Testimony of the James R. Johnston.)

the closing of the agreement dated July 1, 1945, did you next talk to any of the Jim Dandy Market partners or their agents concerning this same set of markets?

A. Now, if you mean by the "closing of the agreement," you mean when the escrow was closed and everything all through?

Q. No, I asked you subsequent to the completion of the first agreement—I understand your testimony and there is [78] evidence the first agreement was July 1, 1945? A. That is right.

Q. The first agreement, the one dated July 1, 1945, was all completed and signed and they went into possession under it. I think that is all in evidence from the documents and stipulations.

A. That is true.

Q. Now then, following that, when did you next have a conversation with any of the Jim Dandy partners or their agents relative to that group of markets?

A. Well, following the execution of that first agreement we still had to go through escrow and there were certain things in connection with the papers which were required in the escrow that necessitated me seeing both Mr. Russell and some of the co-partners.

Q. All of which was consummating the first agreement? A. That is right.

Q. And did any of those conversations have anything to do with the subject matter of the sale or lease? A. (No answer.)

(Testimony of the James R. Johnston.)

Q. Or was it purely a matter of consummating the things that were agreed to be done?

A. Yes; that was purely following out the things necessary to complete the transaction agreed upon.

The Court: In other words, the terms were no longer [79] discussed?

The Witness: That is right.

The Court: They had been agreed upon before?

The Witness: That is right.

Q. (By Mr. Thomas): What I am trying to direct to your attention is that subsequent to the completion of the first one and their possession when did you next have a conversation?

The Court: I will let you ask the witness a leading question whether Mr. Sadicoff objects or not. Let me ask the question.

Mr. Sadicoff: To what point is that giving me the right to object if your Honor already overrules my objection?

The Court: I will listen to your objection after the question is put. After it was completed in escrow, the original agreement, did you have any further conversations?

The Witness: Not for almost a year.

The Court: Tell us that year and let us start from there. Tell us what, if any, conversations you had either with the partners or their representatives?

The Witness: Well, Mr. Russell—

The Court: First the date.

(Testimony of the James R. Johnston.)

The Witness: Mr. Russell approached me in May of 1946 telling me that Mr. Schuster—

Mr. Thomas: I didn't hear the beginning of that.

The Court: He said Mr. Russell approached him in May of 1946.

The Witness: Telling me that Mr. Schuster had talked to Mr. Smith relative to executing his option at that time rather than nine years in the future, and that Mr. Smith would listen to it, but we would have to work out some sort of deal on it. That started the new negotiations that led to the modified agreement.

Q. By Mr. Thomas: Now, who did you next talk to after that? Were you at that time acting as Mr. Smith's agent when Mr. Russell approached you?

A. Well, that was merely a presumption at that time because I had been Mr. Smith's agent for a great many years. I hadn't yet contacted Mr. Smith.

The Court: But you communicated that to Mr. Smith?

The Witness: Yes, sir.

The Court: To whom?

The Witness: Mr. Smith.

The Court: After that what did you tell Mr. Smith?

The Witness: Mr. Smith told me at that time he wouldn't consider exercising the option at the price of \$192,500 for several reasons of his own, but he would consider it at a higher figure, but he

(Testimony of the James R. Johnston.)

wouldn't pay me the commission for handling the deal nor he didn't want me to again hire the attorney for him; that their attorney could prepare the papers [81] and they would have to pay whatever commissions were involved. Other than that he would consider selling at a price.

The Court: All right.

The Witness: The price that he gave first to me I believe was \$235,000, and in the negotiations he finally agreed upon \$225,000.

The Court: All right.

Q. By Mr. Thomas: Now, in your conversations with Mr. Russell or with any of the partners leading up to or looking to the settlement of that price, or the making of the supplemental agreement, was the building on the Atlantic Market site ever mentioned?

Mr. Sadicoff: Just a minute. I submit the proper foundation should be laid because we don't know yet whether the conversation was with Russell or the partners and I think we are entitled to know.

The Court: Let me ask you this question.

Mr. Thomas: Yes, your Honor.

The Court: I will put it this way. I think the question should be split.

Mr. Thomas: I will split it.

The Court: Ask him what if any conversation he had, or did you have any conversation with Russell, and if he says yes, then ask him if he had a conversation with anyone else relating to the same

(Testimony of the James R. Johnston.)

topic. I think that would overcome the [82] objection. It is a multiple question and the answers may not be very revealing.

Q. By Mr. Thomas: Did you during any times in the negotiation for the supplemental agreement have any conversation with Mr. Russell relative to the building on the Atlantic Market site?

A. No, sir.

Q. Did you have a conversation relative to that building with any one of the partners?

A. No, sir.

Mr. Menzies: May I have the answer?

The Witness: No, sir.

Q. By Mr. Thomas: Did you have a conversation relative to that building with anybody else that was an agent for the partnership?

A. No, I did not.

Mr. Thomas: That is all.

Mr. Sadicoff: That is all, Mr. Johnston.

Mr. Menzies: No questions.

Mr. Thomas: If your Honor please, I arranged with Judge Cassidy, the lawyer at Huntington Park, who is pretty elderly now, to come here. He said he would come when I called him. I called him at noon when I saw how we are expediting this matter and he begged off until somebody could bring him in in the morning.

I don't know that it is essential, but with that reservation that is all the testimony I have.

The Court: Maybe counsel will stipulate what he will testify to. It is already in evidence that

Mr. Cassidy was evidently recommended for employment by Mr. Johnston.

Mr. Thomas: He was attorney, but Mr. Sadicoff and I couldn't agree in reference to a stipulation a while ago, and whether we can after the testimony is in I don't know.

The Court: The thing you could not agree upon was whether he actually prepared the documents?

Mr. Thomas: He did and they were put out on his paper. This is the question that I think he should answer and that is whether he drew them with an understanding of the significance of this building or the place of the building and if it was in the picture.

The Court: Well, his understanding is not material. It is the understanding of Mr. Smith.

Mr. Thomas: He is the one who drew the documents and if he had understood something on any false premise, my theory if he had misunderstood any of the things in which he was drawing that was the reason I thought it was proper to bring him here.

The Court: Suppose I declare a short recess and you talk with Mr. Sadicoff and see if he will stipulate as to what he would testify to? Frankly, gentlemen, I work rather [84] long hours and I am anxious to close the testimony and I wouldn't like to keep the case open for that purpose. In addition to that, Mr. Sadicoff and Mr. Davis, well, not Mr. Davis, but Mr. Sadicoff should have an opportunity in the light of all your testimony to present a mo-

tion to dismiss. I have already indicated that I wouldn't grant it. But he should be able to put his motion on record and he can't do that until you actually rest, so I will declare a recess and you gentlemen see if you can stipulate as to what Mr. Cassidy would testify if called as a witness and then we will save him the trouble of coming here if it isn't necessary. Mr. Sadicoff may be willing to agree that if he were called he would testify along a certain line.

If Mr. Sadicoff feels he cannot do it, then I will govern myself accordingly and we will do something else.

Mr. Sadicoff: Counsel knows I am in most cases, very cooperative.

The Court: Well, you gentlemen can get together. Incidentally, I find this case has been kind of mixed up on the record. I sent a note to Judge Hall asking him to transfer it here and he said that he had already transferred it out of his department to the clerk for re-assignment, and that the clerk re-assigned it to Judge Harrison. We have to check the minutes to see who is going to sign. I am senior judge now and I am also the trial judge. It may be [85] that I will have to sign in three places.

Mr. Davis: A question of jurisdiction or venue.

The Court: Because Judge Harrison is ill at home and we have to see what minute order was made and how this happens to be wandering

around and landed in my court without any record at all of an assignment.

Mr. Menzies: May I inquire what time you are going to adjourn?

The Court: I will run until five o'clock.

Mr. Menzies: You won't run later than that? I have to make some arrangements.

The Court: I have been going later than that every night this week, but I won't do it tonight.

(Short recess.)

The Court: You may proceed.

Mr. Thomas: Judge Cassidy is here now, your Honor.

The Court: Very well.

THOMAS V. CASSIDY,

called as a witness by and on behalf of the Defendant Smith, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness. Thomas V. Cassidy.

Direct Examination

By Mr. Thomas:

Q. Mr. Cassidy, you are an attorney at law, are you not? [86] A. Yes, sir.

Q. Practicing in Huntington Park?

A. Yes, sir.

Q. Do you know Mr. E. F. Smith, the defendant in this action? A. I do.

Q. One of them? A. Yes.

Q. You were his attorney in 1945 and 1946 and on various jobs? A. Yes, I was.

(Testimony of Thomas V. Cassidy)

Q. Now, this suit concerns an agreement between Jim Dandy Markets and Mr. Smith, the original of which was drawn in July, July 1st, 1945. Do you remember the transaction?

A. I do.

Q. And do you remember drawing the agreement?

A. Yes, I remember it.

Q. And then about a year later, in June, 1946, not quite a year later, there was a supplemental and modified agreement drawn?

A. Yes, sir.

Q. And in both instances you acted as Mr. Smith's attorney for the preparation of the documents involved in those transactions?

A. I don't recall right now about the supplemental [87] agreements. If you are talking about the same things I am—

Q. You remember about the original agreement drawn July 1st.

The Court: Show him a copy of the document and he will probably remember when he sees the exhibit.

Mr. Thomas: It is in the pleadings and is Exhibit 13.

Mr. Sadicoff: The agreement of July 1945.

The Court: This is not on your original paper, Mr. Cassidy. This is a copy which is attached to Mr. Smith's answer. By looking at it you will

(Testimony of Thomas V. Cassidy)
probably recollect it. This is dated July 1st, 1945,
and is Exhibit 13.

The Witness: Yes, I recall this.

Q. By Mr. Thomas: Now, Plaintiffs' Exhibit 6, which is "B" in the Jim Dandy answer, your Honor, and I will change it—that is Plaintiffs' Exhibit 7.

The Court: This is a photostat, Mr. Cassidy. It is called "Supplementary and Modified Agreement", dated June 12th, 1946. It has seven pages.

The Witness: I recall this now.

Q. By Mr. Thomas: You recall it?

A. Yes.

Q. Now, in Exhibit No. 10—

Mr. Menzies: That is "F" in the answer.

The Witness: Here is 10. [88]

The Court: Go ahead.

Q. By Mr. Thomas: Now, do you remember those documents?

A. Yes, I do.

Q. And there was also some others but those are the ones that I think will identify the subject matter here. Do you remember the drawing of that assignment of the lease, Defendants' Exhibit 10, and did you have any conferences with any of the Jim Dandy partners or their agents in regard to it?

A. I do not recall any conferences with Jim Dandy on this.

The Court: Did you with Mr. Russell? If we

(Testimony of Thomas V. Cassidy)

give you a name could you remember it? Did you ever see Mr. Russell, their agent?

The Witness: Most of these, if the court please, were drawn at the suggestion and request of Mr. Smith's agent.

The Court: Mr. Smith's agent?

The Witness: Yes, Mr. Johnston.

Q. By Mr. Thomas: Do you know Mr. Schuster, or Mr. Goldberg?

A. I wouldn't know them. I know who they are.

Q. Mr. Earl Swetow?

Q. Yes, I know Mr. Swetow.

Q. Did you ever talk to him about it?

A. I don't know whether we discussed this, but I talked [89] to Mr. Swetow about the agreements, but this particular one I don't have no independent recollection.

Q. Did you with the general group?

A. Yes, sir.

Q. Did you ever talk to Mr. Swetow about the building situated on the Atlantic Market site?

A. No, I did not.

Q. Did you ever talk to Mr. Charles Schuster or Mr. Leo A. Goldberg or Mr. Berick or Mr. Norman Schuster about the building situated on Atlantic Boulevard?

A. No, I did not.

Q. Did you in drawing this give any consideration or have any knowledge of any dealing with that building?

(Testimony of Thomas V. Cassidy)

A. No.

Mr. Sadicoff: That is objected to as calling for a conclusion of the witness and is incompetent, irrelevant and immaterial—any undisclosed intention that he had.

The Court: I will sustain the objection but you may ask him what instructions he received from Mr. Johnston in regard to the building. I will sustain the objection. He already stated he had no direct word about the building.

Q. By Mr. Thomas: What instructions did you have from anyone concerning the treatment of the building on the Atlantic Market site?

The Court: Before drawing this instrument, Exhibit 10? [90]

The Witness: None. There was no instructions of any kind. The buildings were never mentioned in my presence.

The Court: What were you told when you were told to prepare this assignment?

The Witness: The assignment that they were to assign the property referred to in the inventory in the lease.

The Court: The interest in the lease?

The Witness: Yes, it was referring to certain fixtures and equipment.

The Court: But this contract refers to the interest in the leasehold. This assigns the leasehold. This exhibit is entitled "Assignment of Lease," and refers by virtue of: "* * * of the covenants and

(Testimony of Thomas V. Cassidy)

agreements set forth in a certain agreement dated July 1, 1945, and supplementary and modified agreement, dated June 12th, 1946, do hereby sell, assign, transfer and set over unto Charles Schuster, Leo A. Goldberg, Earl A. Swetow, Max M. Berick and Norman Schuster, a certain indenture and lease dated February 1, 1942, by and between Thomas A. McLenaghan, as administrator of the estate of E. T. Williams, deceased, and the undersigned, wherein certain land and buildings therein described were demised to the undersigned for a period of five years from August 1, 1942, to August 7, 1947, at the rental therein stated, together with any renewal or extension of said leases which may be secured by the undersigned, subject to the rents, covenants, [91] and conditions contained in said leases, and herein referred to as Atlantic Store—it being understood, however, that this assignment shall not become effective until the assignee herein has complied with all of the terms and conditions in any way affecting the property hereby leased * * *."

Now, what if any instructions did you receive from Mr. Johnston in regard to that?

The Witness: Well, the only instructions that I received from Mr. Johnston were to prepare an assignment for the lease.

Q. By Mr. Thomas: Did you have any instructions—I will withdraw that.

The evidence already in, Judge, and the agreements refer to four assignments and four units on

(Testimony of Thomas V. Cassidy)

which leases were to be made. Do you remember that there were eight units altogether involved?

A. There were several units as I recall it, that the property was owned outright by Smith and the others he had leases on them, if my memory serves me correctly.

Q. Did you have any instructions from anyone relative to the different statuses of the leased property, relative to the building situated on the leased property?

A. None whatever.

Q. And you drew them all in the same manner as an ordinary assignment? [92]

A. As I recall it, yes.

Q. Did you draw these up originally yourself or were they submitted and revised and re-considered by you?

A. Oh, the original lease—that was drawn by—there was amendments to it and it was incorporated in the original lease by Mr.—I think it was Mr. Swetow of the Jim Dandy. It wasn't drawn at once. There were several changes made in it.

Q. And as to the assignments is that also true?

A. I don't recall him having anything to say about the assignments.

Q. You wrote them up yourself?

A. As I remember it, Mr. Johnston and myself.

The Court: Did I understand you to say you didn't talk to Mr. Smith about this at all?

(Testimony of Thomas V. Cassidy)

The Witness; No.

Mr. Thomas: That is all.

Cross Examination

By Mr. Sadicoff:

Q. Judge Cassidy, how long have you been practicing law? A. (No answer.)

Q. Would you care to tell us?

A. Yes, if I can think back—1911.

Q. In Los Angeles County? [93]

A. All in Los Angeles County.

The Court: I am three years his senior. I have been practicing since 1909.

Mr. Sadicoff: I had better get off the subject of age. That is all, Mr. Cassidy.

Mr. Menzies: Just a minute, Judge.

Q. By Mr. Menzies: When you discussed the original document of July, 1945, with Mr. Johnston, did you also discuss it with Mr. Russell?

A. There was a meeting in my office where Mr. Russell was present together with members of the Jim Dandy group.

Q. And Mr. Johnston?

The Court: Let him finish.

The Witness: Mr. Johnston was there.

Q. By Mr. Menzies: Have you finished, Judge?

A. Yes.

Q. Now, at that time was there any discussion had between any of the parties as to whether or not the buildings that were situated on the Atlantic Market site went over to Jim Dandy or did they remain the property of Mr. Smith?

(Testimony of Thomas V. Cassidy)

Mr. Sadicoff: That is objected to as calling for a conclusion of the witness and is irrelevant, incompetent and immaterial, and does not bear upon any of the issues in this case as to what happened in the original agreement of July 1945. [94]

The Court: The objection is sustained. There is no contention the original agreement needs reforming.

Mr. Menzies: Very well, your Honor. I think that is correct.

Q. By Mr. Menzies: Now, Judge Cassidy, at the time that you drew this supplemental agreement did you discuss the facts and circumstances surrounding that transaction with Mr. Johnston and Mr. Russell?

A. I don't recall Mr. Russell. I discussed it with Mr. Johnston.

Q. Did you discuss it with any of the partners of the Jim Dandy Markets?

A. I doubt if we did in the supplementary agreement.

Q. At the time that you talked to Mr. Johnston about this supplementary agreement was there anything said with relation to the title of the building of the Jim Dandy Market?

Mr. Sadicoff: That is objected to on the ground it is hearsay and not binding upon us.

The Court: Read the question.

(Question read.)

The Court: I will overrule the objection.

(Testimony of Thomas V. Cassidy)

The Witness: No, sir.

Mr. Menzies: That is all, thank you.

Mr. Thomas: I would like to recall Mr. Smith for a couple of questions. [95]

Mr. Menzies: Let me ask one question more of Judge Cassidy.

Q. By Mr. Menzies: Judge Cassidy, did you know whether or not the building went—whether the lease provided for the building going over to Jim Dandy Markets or whether it remained with Mr. Smith?

Mr. Sadicoff: That is objected to as incompetent, irrelevant and immaterial.

The Court: I will sustain the objection.

Mr. Sadicoff: The documents speak for themselves.

The Court: It is not material.

E. F. SMITH

called as a witness by and on his own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

Further Direct Examination

By Mr. Thomas:

Q. Mr. Smith, the assignment of lease, Plaintiffs' Exhibit 10, relative to signing the leases for the Atlantic Market, was signed by you and it was executed and it has been stipulated and it has gone in evidence as that. Now, did you understand at the time you executed that—did you have any

(Testimony of E. F. Smith.)

knowledge or suspicion that that assignment would carry with it the building on the Atlantic Market site?

Mr. Sadicoff: Objected to as incompetent, irrelevant and [96] immaterial, and not within any issues in this case. Withdraw that incompetent, irrelevant and immaterial. The instruments speak for themselves.

Mr. Thomas: It is the whole issue. If there was a meeting of minds and they knew what they were doing there wouldn't be any mistake.

The Court: Of course it might be a mutual mistake.

Mr. Thomas: But I can't prove but one thing at a time.

The Court: I will reserve a motion to strike. I will allow the witness to answer the question.

The Witness: I did not; no, sir. I at no time thought of the building being in the transaction at all.

The Court: Then why did you ask for additional consideration—originally \$45,000, and then \$35,000, for the exercise of the option.

The Witness: When I made the original agreement I figured this equipment would be well worn out in a matter of ten years, and if they bought it at this time and I sold it at this time I figured the equipment had a lot more worth to it and I wouldn't receive that rent for the additional nine years, and I was in no mind to sell, but I figured if they would

(Testimony of E. F. Smith.)

give me the additional money that I asked that I would go ahead and sell.

The Court: But if they exercised the option at the end of ten years the fixtures would merely be second-hand fixtures [97] and how could you be harmed if you exercised it in advance?

The Witness: I wouldn't have received the rent that I would have received during the additional nine years.

The Court: All right.

Mr. Thomas: That is all.

Mr. Sadicoff: That is all.

Mr. Thomas: That is all, your Honor, for the cross complainant.

The Court: Any further witnesses on your part?

Mr. Thomas: No, that is all.

The Court: You rest?

Mr. Thomas: I rest on the cross claim, yes.

The Court: Any testimony desired to be presented?

Mr. Sadicoff: Futile as it may be in view of your Honor's—

The Court: Let us strike out the word "futile."

Mr. Sadicoff: In view of what your Honor stated, I move for a dismissal of the cross claim of the defendant E. F. Smith, upon the ground that there is no evidence adduced which would justify the court in rendering a judgment in favor of Mr. Smith on his cross claim.

The Court: The motion will be denied. I think the matter presents a question of law which can

be better determined when all the evidence is in the record. [98]

You may call any other witnesses you desire.

Mr. Sadicoff: The defendant Jim Dandy Market rests.

The Court: All right. Is there any rebuttal?

Mr. Menzies: I take it the defendant Fireman's Fund is not going to introduce any evidence?

The Court: No, no.

Mr. Menzies: There is no rebuttal then.

May I ask Mr. Davis this, although he be the backseat driver and is resting on his rights, whether or not there is any dispute as to the fact that the Fireman's Fund received a proof of loss within the time prescribed in the policy and no objection was taken, or whether there was an objection to it.

Mr. Davis: Well, I stand on my Constitutional rights and in the most polite words I know I will say it is none of your business. There is no issue been brought against us and I am not called upon to answer.

The Court: What answer did you put in, Mr. Davis?

Mr. Davis: I put in an answer.

The Court: As I gather it he is asking for a declaration as to whether he is entitled to an apportionment of the loss clause.

Mr. Davis: That is a question of law, your Honor.

The Court: I just wanted to find out as to the factual situation. Of course I am not going to tell

you to put [99] anything in if you don't want to, but I wanted to see what declaration he has against you.

Mr. Davis: He has none against me other than as it affects the Jim Dandy Market.

The Court: You don't want to stipulate as to whether they have made proof of loss?

Mr. Davis: I will make no issue on it, your Honor. I think it is immaterial. I think it is already stipulated to, anyway.

Mr. Sadicoff: Stipulated in Exhibit A in the pre-trial hearing that we had before Judge Hall. It was stipulated that the defendant Smith had done everything required of him to be done under the terms of the policy with the Fireman's Fund.

The Court: Does that apply to the policy of the Fireman's Fund?

Mr. Sadicoff: Yes.

Mr. Davis: I stipulated with the same reservations I am making here. I said for their purpose only I would so stipulate.

Mr. Menzies: I take it you are not introducing any evidence at this time.

Mr. Davis: There is no issue I have to meet.

Mr. Menzies: All parties rest, your Honor.

(Argument which followed was reported but not transcribed.) [100]

(Whereupon, the above entitled matter was concluded.) [101]

CERTIFICATE

I do hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 22nd day of June, A.D. 1948.

/s/ J. D. AMBROSE,
Official Reporter.

[Endorsed]: Filed Jun. 25, 1948.

[Endorsed]: No. 11982. United States Court of Appeals for the Ninth Circuit. E. F. Smith, Appellant, vs. Jim Dandy Markets, Inc., Fireman's Fund Insurance Company, Central Manufacturers' Mutual Insurance Company, and Indiana Lumbermen's Mutual Insurance Company, Appellees, and Central Manufacturers' Mutual Insurance Company, and Indiana Lumbermens Mutual Insurance Company, Appellants, vs. Jim Dandy Markets, Inc., Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed July 19, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals for the Ninth
Circuit

No. 11982

E. F. SMITH,

Appellant,

vs.

JIM DANDY MARKETS, INC., et al.,

Appellees.

APPELLANT SMITH'S STATEMENT OF
POINTS ON WHICH HE INTENDS TO
RELY ON THE APPEAL AND DESIGNA-
TION OF RECORD

Appellant E. F. Smith, pursuant to Rule 19 (6) of the Rules Circuit Court of Appeals, 9th Circuit, makes the following statement of the points on which he intends to rely on the appeal:

1. The judgment is contrary to the law and the evidence: (a) In adjudicating that defendant Jim Dandy Markets, Inc., was the sole unconditional owner of the building known as the Atlantic Store and;

(b) In adjudicating that the assignment of lease dated June 27, 1946 conveyed to the predecessors in interest of defendant Jim Dandy Markets, Inc., all right, title, and interest of defendant E. F. Smith to the building destroyed by fire;

(c) In adjudicating that there is no showing of mutual mistake or any mistake in the execution of said assignment;

(d) In adjudicating that the defendant Fireman's Fund Insurance Company is entitled to go hence.

2. That part of Finding of Fact XII that at the time the building known as the Atlantic Store was destroyed by fire on January 14, 1947, the defendant Jim Dandy Markets, Inc., was the sole and unconditional owner of said building, is contrary to the evidence.

3. That part of Finding XVI that on June 27, 1946 defendant E. F. Smith sold, assigned and transferred to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all of his right, title and interest in said building and that at no time subsequent thereto did said E. F. Smith have any interest in said building other than a lien for the payment of the purchase price thereof, is contrary to the evidence.

4. That part of Finding of Fact XVII that in accordance with the agreement entered into between the defendant E. F. Smith and the predecessors of the defendant Jim Dandy Markets, Inc., on June 27, 1946 and by the terms thereof and by the assignment of lease found by the Court, the defendant E. F. Smith sold, assigned, and transferred to the predecessors of the defendant Jim Dandy Markets, Inc., all right, title and interest in and to the building referred to in the findings, is contrary to the evidence.

5. That part of Finding XVII that there was no other or different agreement between said parties than as evidenced by said written assignment and the said written assignment embodied the entire

agreement between the parties thereto, is contrary to the evidence.

6. That part of Finding XVII that the written agreement, consisting of exhibits "7", "8", "9", and "10", constituted the entire agreement between said parties, and that said agreement correctly expressed the intention of the parties thereto and that there was no mistake either mutually or otherwise in the drafting of said assignment, which intended to and was effective in conveying from the defendant E. F. Smith to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all the right, title and interest of said defendant E. F. Smith in and to said building, is contrary to the evidence.

7. That part of Finding XIX that it was not true that during the negotiations and the discussions between the defendant E. F. Smith and the predecessors in interest of the defendant Jim Dandy Markets, Inc., or their brokers or agents, the building was not considered as a subject of the proposed sale, is contrary to the evidence.

8. That part of Finding XIX that it is not true that the value of said building was in no wise considered as an element of the sales price agreed upon, is contrary to the evidence.

9. That part of Finding XIX that it is not true that said assignment found by the Court does not correctly contain the agreements between the defendant E. F. Smith and the predecessors in interest

of the defendant Jim Dandy Markets, Inc., is contrary to the evidence.

10. That part of Finding XIX that it is not true that defendant E. F. Smith did not intend to convey said building to the predecessors in interest of the defendants Jim Dandy Markets, Inc., and that defendant E. F. Smith did intend to convey said building by said assignment to the predecessors in interest of the defendant Jim Dandy Markets, Inc., is contrary to the evidence.

11. That part of Finding XIX that defendant E. F. Smith, at the time he executed the assignment found by the Court, intended to convey and did convey to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all of his right, title and interest to said building, is contrary to the evidence.

12. That part of Finding XX that it is true that at the time said building was destroyed by fire on January 14, 1947 Jim Dandy Markets, Inc., was the sole and unconditional owner of the leasehold previously owned by defendant E. F. Smith, including the right to the building on said premises, is contrary to the evidence.

13. That part of Finding XX that it is not true that said assignment found by the Court was executed by the defendant E. F. Smith under the mistaken belief that the building destroyed by fire was not conveyed by said assignment and it is not true that said assignment does not truly express the in-

tention of the parties to said assignment and on the contrary that said assignment does truly express the intention of the parties thereto, is contrary to the evidence.

14. The evidence, without contradiction or denial is that:

(a) Smith owned the subject building and the predecessors of Jim Dandy Markets, Inc., were his tenants as sublessees under the original agreement;

(b) At the time of the fire such relation was still in effect by the terms of the modified agreement;

(c) The subject building was worth \$32,476.92 and another building had the same status but the modified agreement did not add one cent to the purchase price as compensation for these buildings:

(d) The building was at no time mentioned by Smith or any of his agents during the negotiations and they at no time considered the building as a subject of the sale.

(e) The predecessors of Jim Dandy Markets, Inc., considered the building a subject of the sale and the deduction is inescapable that they knew that Smith did not so consider it.

15. The assignment on which Jim Dandy Markets, Inc., relies as conveying title is a document which was executed in compliance and consummation of the agreement as modified and the intention of the parties is to be determined from the original and modified agreements and not from some technical but unspecified meaning which is read into it.

DESIGNATION OF RECORD

Appellant E. F. Smith hereby designates the parts of the record which he thinks necessary for the consideration of his points on appeal as all of the record except plaintiff's exhibits No. 2, No. 3, and No. 4, which exhibits were transmitted to the Appellate Court and were not copied by the Clerk of the Trial Court and need not be printed for the consideration of the foregoing points.

CLYDE THOMAS and
MILAN MEDIGOVICH,

By /s/ CLYDE THOMAS,

Attorneys for Appellant E. F. Smith.

(Acknowledgment of Service attached.)

[Endorsed]: Filed July 27, 1948. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

Subject to the order of the Court, it is hereby stipulated that the following named exhibits need not be printed in the record but may be referred to and considered in their original form, to wit:

Plaintiff's Ex. No. 2, Central Manufacturer's Insurance Policy.

Plaintiff's Ex. No. 3, Indiana Lumbermans Insurance Policy.

Plaintiff's Ex. No. 4, Fireman's Fund Insurance Policy.

Said exhibits were transferred to the Appellate

Court by order of the trial court and were not reproduced by the Clerk of the Trial Court.

The reason for this stipulation to not reproduce said exhibits is that reference will be made to only very short portions of said policies readily printable in the briefs; that said policies are exceedingly long, many paragraphs are duplicatures, and the printing thereof would be excessively costly with no compensating advantage in the consideration of the case.

Dated: July 22, 1948.

CLYDE THOMAS and
MILAN MEDIGOVICH,

By /s/ CLYDE THOMAS,

Attorneys for Appellant E. F. Smith.

THOMAS P. MENZIES and
HAROLD L. WATT,

By /s/ HAROLD L. WATT,

Attorneys for Appellees Central Manufacturers'
Mutual Insurance Co. and Indiana Lumbermans
Mutual Insurance Company.

HARRY G. SADICOFF,

By /s/ EDWARD I. HARRIS,

Attorney for Appellee Jim Dandy Markets, Inc.

HINDMAN & DAVIS and
E. EUGENE DAVIS,

By /s/ E. EUGENE DAVIS,

Attorneys for Fireman's Fund Insurance Company.

It is so ordered:

/s/ FRANCIS A. GARRECHT,

Senior U. S. Circuit Judge.

[Endorsed]: Filed July 26, 1948. Paul P.
O'Brien, Clerk.

No. 11982.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. F. SMITH,

Appellant,

vs.

JIM DANDY MARKETS, INC., FIREMAN'S FUND INSURANCE COMPANY, CENTRAL MANUFACTURER'S MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellees,

and

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC.,

Appellee.

APPELLANT SMITH'S OPENING BRIEF.

CLYDE THOMAS,

MILAN MEDIGOVICH,

611 Title Guarantee Building, Los Angeles 13,

Attorneys for Appellant E. F. Smith.

TOPICAL INDEX

	PAGE
A.	
Statement of the pleadings and facts disclosing jurisdiction.....	1
B.	
Statement of the case.....	2
C.	
Specification of errors.....	4
D.	
Argument	8
Summary	8
The assignment of the lease did not convey the building to Jim Dandy Markets.....	9
If the assignment is construed as conveying the building and the insurable interest to Jim Dandy Markets, then it should be reformed as having been executed by mutual mistake and without consideration	9
Facts	9
The original agreement.....	10
The supplementary and modified agreement.....	11
The assignment of the lease did not convey the building to Jim Dandy Markets.....	14
(1) The parties did not intend to convey the building.....	14
(2) The building was personal property and not a part of the lease	19
(3) The assignment was not consummated.....	20
If the assignment is construed as conveying the building and the insurable interest to Jim Dandy Markets, then it should be reformed as having been executed by mutual mistake and without consideration.....	22
(1) The mistake of the parties.....	22
(2) Intention of the parties.....	25
(3) Equitable and conscientious agreement.....	25
Argument applied to specification of errors.....	26
Conclusion	29

TABLE OF AUTHORITIES CITED

CASES	PAGE
Baines v. Zuieback, 191 P. 2d 67, 84 A. C. A. 609, 85 A. C. A. 75	24
Bisno v. Herzberg, 170 P. 2d 973, 75 Cal. App. 2d 235.....	24
Bowman v. Union Trust Co., 106 P. 2d 913, 41 Cal. App. 2d 397	20
Clark v. Talmadge, 74 P. 2d 825, 23 Cal. App. 2d 703.....	20
Simmons v. California Institute of Technology, 194 P. 2d 521, 31 A. C. 244.....	19
Vierneisel v. Rhode Island Insurance Co., 175 P. 2d 63, 77 Cal. App. 2d 229.....	21

STATUTES

Civil Code, Sec. 1642.....	15
Civil Code, Sec. 1650.....	15
Civil Code, Sec. 1653.....	15
Civil Code, Sec. 3399.....	22
Civil Code, Sec. 3400	22, 25
Civil Code, Sec. 3401.....	22
United States Code, Title 28, Sec. 41(1)(b).....	2

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Appellees,

and

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC.,

Appellee.

APPELLANT SMITH'S OPENING BRIEF.

A.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.

Plaintiff, Central Manufacturers Mutual Insurance Company, is an Ohio corporation and plaintiff, Indiana Mutual Insurance Company, is an Indiana corporation. The defendant Jim Dandy Markets, Inc., and the defend-

ant Fireman's Fund Insurance Company is each a California corporation and defendant E. F. Smith is a resident of California. [R. 2 to 4.]

Plaintiffs seek a declaration of their liabilities under fire insurance policies issued by them to Jim Dandy Markets, a co-partnership, and the predecessor of the defendant Jim Dandy Markets, Inc. Each insured a store building against destruction by fire in the amount of \$12,500.00 or a total of \$25,000.00. [R. 4 and 5.] The building burned and it developed that it was claimed by defendant E. F. Smith and that he had insured it with the Fireman's Fund Insurance Company for \$16,700.00. [R. 6.] The present action is for the determination and declaration of the rights and liabilities of plaintiffs under their policies. [R. 8 and 9.]

The jurisdiction of the Federal Court is predicated on the diversity of citizenship between the plaintiffs and defendants and on the fact that more than \$3000.00 is involved in the controversy as authorized by Title 28, U. S. C., Section 41 (1) (b).

B.

STATEMENT OF THE CASE.

A store building known as the Atlantic Market in Bell, California, was destroyed by fire. The defendant, Jim Dandy Markets, Inc., formerly Jim Dandy Markets, a co-partnership claiming ownership, had insured the building with the plaintiff companies for a total of \$25,000.00. [R. 4 and 5.] Defendant E. F. Smith also claimed the building and had insured it with the defendant Fireman's Fund Insurance Company for the sum of \$16,700.00. [R. 6.]

After the fire the plaintiff insurance companies brought the instant action for the purpose of having its rights determined and declared. [R. 9.]

Defendant E. F. Smith answered the complaint and alleged that he is the sole owner of the building in question [R. 20], and that defendant Jim Dandy Markets, Inc., was in possession thereof only as tenant and sub-tenant of defendant Smith [R. 23], all as provided in an agreement between them. [R. 27.] He asked the court to declare that he was the owner of the building and that the ownership constituted an insurable interest therein. [R. 26.]

Defendant Smith also filed a cross-claim against defendant Jim Dandy Markets, Inc., alleging that it had come to his attention that the defendant Jim Dandy Markets, Inc., claimed that the assignment of the ground lease on which the Atlantic market was situated carried with it and conveyed title to the building built by defendant Smith. The cross-claim then alleges that if such construction should prevail, the assignment [R. 86], should be reformed as not being in accordance with the agreement of the parties, having been executed by mutual mistake. [R. 42 and 43.]

Defendant Smith thus submitted to the court two claims, one, the building in question belonged to him and was never transferred, and, two, if the assignment is construed as transferring the building, then it was executed by mistake and should be reformed so as not to convey the building.

The ultimate question to be determined is who owned the store building which was destroyed by fire on January 14, 1947. If the building belonged to defendant Smith or he had an insurable interest therein, he is entitled to be

paid on the insurance policy written for him by the defendant Fireman's Fund Insurance Company. If the building had been transferred to Jim Dandy Markets and it held the insurable interest therein, then it is entitled to collect on the insurance policies written for it by the plaintiffs.

Defendant Jim Dandy Markets claimed to be the sole and unconditional owner of the building by virtue of the assignment of the lease and that it was entitled to collect insurance from the plaintiff companies.

C.

SPECIFICATION OF ERRORS.

Appellant E. F. Smith hereby specifies and will rely upon errors as follows:

1. The judgment is contrary to the law and the evidence:

(a) In adjudicating that defendant Jim Dandy Markets, Inc., was the sole unconditional owner of the building known as the Atlantic Store; and

(b) In adjudicating that the assignment of lease dated June 27, 1946, conveyed to the predecessors in interest of defendant E. F. Smith to the building destroyed by fire;

(c) In adjudicating that there is no showing of mutual mistake or any mistake in the execution of said assignment;

(d) In adjudicating that the defendant Fireman's Fund Insurance Company is entitled to go hence.

2. That part of Finding of Fact XII that at the time the building known as the Atlantic Store was destroyed by fire on January 14, 1947, the defendant Jim Dandy Markets, Inc., was the sole and unconditional owner of said building, is contrary to the evidence.

3. That part of Finding XVI that on June 27, 1946, defendant E. F. Smith sold, assigned and transferred to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all of his right, title and interest in said building and that at no time subsequent thereto did said E. F. Smith have any interest in said building other than a lien for the payment of the purchase price thereof, is contrary to the evidence.

4. That part of Finding of Fact XVII that in accordance with the agreement entered into between the defendant E. F. Smith and the predecessors of the defendant Jim Dandy Markets, Inc., on June 27, 1946, and by the terms thereof and by the assignment of lease found by the Court, the defendant E. F. Smith sold, assigned and transferred to the predecessors of the defendant Jim Dandy Markets, Inc., all right, title and interest in and to the building referred to in the findings, is contrary to the evidence.

5. That part of Finding XVII that there was no other or different agreement between said parties than as evidenced by said written assignment and the said written assignment embodied the entire agreement between the parties thereto, is contrary to the evidence.

6. That part of Finding XVII that the written agreement, consisting of Exhibits "7," "8," "9," and "10," constituted the entire agreement, correctly expressed the intention of the parties thereto and that there was no mistake either mutually or otherwise in the drafting of said assignment, which intended to and was effective in conveying from the defendant E. F. Smith to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all the right, title and interest of said defendant E. F. Smith in and to said building, is contrary to the evidence.

7. That part of Finding XIX that it was not true that during the negotiations and the discussions between the defendant E. F. Smith and the predecessors in interest of the defendant Jim Dandy Markets, Inc., or their brokers or agents, the building was not considered as a subject of the proposed sale, is contrary to the evidence.

8. That part of Finding XIX that it is not true that the value of said building was in nowise considered as an element of the sales price agreed upon, is contrary to the evidence.

9. That part of Finding XIX that it is not true that said assignment found by the Court does not correctly contain the agreements between the defendant E. F. Smith and the predecessors in interest of the defendant Jim Dandy Markets, Inc., is contrary to the evidence.

10. That part of Finding XIX that it is not true that defendant E. F. Smith did not intend to convey said building to the predecessors in interest to convey said building

to the predecessors in interest of the defendants Jim Dandy Markets, Inc., and that defendant E. F. Smith did intend to convey said building by said assignment to the predecessors in interest of the defendant Jim Dandy Markets, Inc., is contrary to the evidence.

11. That part of Finding XIX that defendant E. F. Smith, at the time he executed the assignment found by the Court, intended to convey and did convey to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all of his right, title and interest to said building, is contrary to the evidence.

12. That part of Finding XX that it is true that at the time said building was destroyed by fire on January 14, 1947, Jim Dandy Markets, Inc., was the sole and unconditional owner of the leasehold previously owned by defendant E. F. Smith, including the right to the building on said premises, is contrary to the evidence.

13. That part of Finding XX that it is not true that said assignment found by the Court was executed by the defendant E. F. Smith under the mistaken belief that the building destroyed by fire was not conveyed by said assignment and it is not true that said assignment does not truly express the intention of the parties to said assignment and on the contrary that said assignment does truly express the intention of the parties thereto, is contrary to the evidence.

D.

ARGUMENT.

Summary.

Defendant Smith contends that he was at all times the owner of the building and it was never transferred from himself. And the facts are that at no time in the entire transaction, either orally or in any document whatsoever, was the building mentioned or any reference made to it except to establish and recognize the title of Smith.

Defendant Jim Dandy Markets contends that even though the building is not mentioned at any time or in any manner as being transferred, nevertheless, by operation of law, it was transferred by an assignment from Smith to Jim Dandy Markets of the land lease on which the building was situated. The position seems to be and the Trial Court seems to have erroneously held that such operation of law is strong enough to overcome a complete unanimity of documentary and oral evidence that the building was not a part of the subject matter to which title was to be transferred.

The assignment is only a document executed in fulfillment of the agreement. It was not negotiated and its terms were not given direct and individual consideration by the parties.

The argument will be broken down to the following headings:

The Assignment of the Lease Did Not Convey the Building to Jim Dandy Markets.

- (1) The parties did not intend to convey the building.
- (2) The building was personal property and not a part of the lease.
- (3) The assignment was not consummated.

If the Assignment Is Construed as Conveying the Building and the Insurable Interest to Jim Dandy Markets, Then It Should Be Reformed as Having Been Executed by Mutual Mistake and Without Consideration.

- (1) The mistake of the parties.
- (2) The intention of the parties.
- (3) Equitable and conscientious agreement.

Facts.

All the evidence in this case consists of written documents and stipulations except oral testimony of defendant Smith, his agent Mr. Johnston, and his attorney Mr. Cassidy. There is, therefore, no conflicting testimony and it is only necessary to interpret and apply the evidence before the court.

The defendant Jim Dandy Markets, Inc., a corporation, is the successor to Jim Dandy Markets, a co-partnership, referred to in most of the agreements. [R. 157] In this brief, reference will be made to Jim Dandy Markets without identification as to whether it is the corporation or the partnership, as the change is not pertinent to this case.

The primary facts will now be enumerated in two groups, those relating to the original agreement, and those relating to the supplementary and modified agreement.

The Original Agreement.

On July 1, 1945, Appellant Smith was the operator of a chain of eight retail stores in Los Angeles and San Bernardino Counties. Four of the markets were owned outright by Smith and four were operated on land leased by him. [R. 27].

The agreement dealt with five basic transactions:

- (a) Smith agrees to sell all salable merchandise in the eight stores [R. 30]. This was a completed transaction and is not pertinent to the instant action.
- (b) Smith leased to Jim Dandy Markets "all store fixtures and equipment" for ten years at a monthly rental of \$1400.00 [R. 31].
- (c) Smith agreed to lease all stores owned outright by him to Jim Dandy Markets for a period of ten years at a specified rental for each [R. 32]
- (d) Smith agreed to sublease the four stores, of which he was lessee, to Jim Dandy Markets for a term of ten years, with provisions for meeting the contingency of different renewal dates or other variable in the terms of the respective leases [R. 33].
- (e) Smith granted to Jim Dandy Markets an option to purchase "all fixtures and equipment" in all of said stores for \$192,500.00 cash, which option "cannot be exercised until the expiration of said ten years" [R. 38].

Among other details Smith agreed to pay all taxes and keep all fixtures insured at his expense [R. 39].

Jim Dandy markets went into possession at the beginning of the morning of July 5, 1945, and remained in possession until the time of the fire, January 14, 1947 [R. 163].

The Atlantic market was located on two parcels of land and Smith was the lessee of each parcel. Each ground lease provided that Smith was the owner of the improvements on the premises and that all additional improvements placed there during the term of the lease should belong to him and could be removed by him at the expiration of the term. [R. 58 and 63.]

Pursuant to the original agreement, Smith executed a sublease of the Atlantic store to Jim Dandy Markets. Two different references are made in the sublease to buildings now on said property now owned by Smith. [R. 197 and 199.]

Smith insured all buildings of the various stores including the Atlantic store with the defendant Fireman's Fund Insurance Company, which policy was in effect at noon, July 5, 1945, and thereafter until and at the time of the fire. [R. 153, 154.]

Pursuant to the agreement [R. 31] and to the sublease [R. 200], an inventory was made of the fixtures and equipment. [R. 207 to 214, incl.]

The Supplementary and Modified Agreement.

After the original agreement had been in operation about eleven months [R. 274], the defendant Smith was approached by Mr. Schuster, one of the Jim Dandy Markets group, with the idea of purchasing the markets instead of continuing the lease for another nine years. [R. 273 and 278.] The transfer of the Atlantic market building or the lease was not mentioned, but reference

made only to the taking up of the "option." [R. 280 and 281.]

The transaction as to the original agreement and as to the supplementary and modified agreement was handled for Mr. Smith by his agent, Mr. Johnston [R. 283], who testified that during the negotiations for the original agreement the partners examined the leases and discussed the fact that Mr. Smith had built the buildings on leased ground and was the owner of the buildings at the Atlantic and the Ontario Markets. [R. 285.] This was the only discussion ever held with any of the Jim Dandy Markets group or their agents relative to the buildings. [R. 285 and 291.]

The lawyer who drew the papers for Mr. Smith never talked about the buildings to any one. [R. 297.] His instructions did not mention the building but referred to the inventory in the lease, certain fixtures and equipment. [R. 298.] He had no instructions relative to the titles of the buildings situated on the respective leases, but drew all assignments of leases as an ordinary assignment and in the same manner. [R. 300.] It was stipulated that the assignments on all of the various markets were in the same form as the assignment of the lease on the Atlantic market. [R. 267.]

The supplementary and modified agreement, dated June 12, 1946, was drawn under the circumstances just described and changed the original agreement in certain essentials as follows:

- (a) Smith agreed to sell "fixtures, machinery and equipment" for a price of \$225,000.00 on certain instalment payments as therein provided. [R. 65 and 66.]

- (b) An escrow was to be opened and a bill of sale of the “fixtures, machinery and equipment” placed therein, together with the original leases and assignments thereof on each of the markets leased by Smith including the Atlantic market. [R. 67 and 68.]
- (c) The lease under the original agreement upon the “fixtures, machinery and equipment” was cancelled and terminated as of the first day of July 1946. [R. 68 and 69.]
- (d) With reference to the leases and written assignments thereof, the subleases pertaining to the same subject matter “shall be deemed cancelled and terminated as of the date of delivery from escrow of the leases and assignments thereof.” [R. 69.]
- (e) The documents in escrow were to be delivered to Jim Dandy Markets when the full purchase price was paid on any or all of the markets. [R. 69 and 70.]
- (f) A separate value was placed on each of the eight markets including the Atlantic Boulevard market, which value was fixed at \$27,300.00. [R. 70.]
- (g) The Jim Dandy Markets agreed on and after the first day of July 1946 to keep the “fixtures, machinery and equipment” fully insured with loss payable to Smith until the full purchase price had been paid. [R. 72 and 73.]
- (h) Except as modified, the original agreement remained in full force and effect. [R. 73.]

As provided in the supplementary and modified agreement, an escrow was opened and the papers placed therein [R. 252], including the bill of sale [R. 84], the ground

leases on the Atlantic market sites [R. 56 and 61], and the assignment of the leases on the Atlantic market. [R. 86.] These documents were still in escrow at the time of the fire. [R. 148.]

The Atlantic market building was totally destroyed by fire on the morning of January 14, 1947. [R. 143.] An adjuster's agreement established the loss from the burning of the building at \$32,476.92. [R. 194.]

The assignment provided that it should not become effective until the assignee had paid the full purchase price fixed in the supplementary and modified agreement and had complied with all of the terms and conditions in any way affecting the leased property as set forth in the original agreement and in the supplementary and modified agreement. The assignment then provided that the sublease then in existence on the property should be null and void "upon this assignment going into effect." [R. 87.] It further provides, as does the supplementary and modified agreement, that if the lessor's approval is necessary and is not secured, the sublease shall remain in effect. [R. 87, 88.]

The Assignment of the Lease Did Not Convey the Building to Jim Dandy Markets.

(1) THE PARTIES DID NOT INTEND TO CONVEY THE BUILDING.

The intention of the parties must be determined from all the contracts and documents making up the transaction between Smith and Jim Dandy Markets. Particular clauses are subordinate to the general intent and words which are wholly inconsistent with the main intention are to be rejected. This is the California law as established in the following sections of the Civil Code.

Sec. 1642. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction are to be taken together."

Sec. 1650. "Particular clauses of a contract are subordinate to its general intent."

Sec. 1653. "Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected."

An examination of the contracts between the parties discloses that the physical properties of the eight markets were separated into three categories: The merchandise [R. 30], which was immediately sold for cash and did not again become involved in the transaction; the fixtures and equipment [R. 31 and 65]; and the real property and stores. [R. 32 and 33.]

Under the original agreement the fixtures and equipment were leased for ten years [R. 31] with an option to purchase at the end of the ten year period. [R. 38.] The supplementary and modified agreement was a contract of sale [R. 65 and 66] of the same subject matter and the same items. The bill of sale [R. 85] which was placed in escrow specifically refers to the inventory of the fixtures and equipment which has been prepared in accordance with the original agreement and the sublease.

As to the real property and stores, the original agreement merely established Jim Dandy Markets as a tenant of the premises—the stores owned outright by Smith were leased by him to Jim Dandy Markets [R. 32] while the stores of which he was the lessee were subleased to Jim Dandy Markets. [R. 33.] The supplementary and modified agreement did not change the leases of the

stores owned outright by Smith except to provide that Jim Dandy Markets might sublease them without Smith's consent. [R. 71.] The subleases were to remain in effect until the full purchase price was paid and the escrow closed on each store [R. 69], whereupon the assignment of the lease was to be delivered to Jim Dandy Markets.

The language of the contract does not indicate that the assignment was for any purpose other than as a convenient way of handling the leased property when Smith's interest in the fixtures and equipment was terminated. In fact, it is clear that the parties were still considering this merely as a method of providing the place where Jim Dandy Markets could continue to conduct business with the fixtures and equipment purchased from Smith. Thus, the supplementary and modified agreement provides that if permission of the lessor is necessary to the assignment of the lease and is not secured, then the sublease shall continue in effect. [R. 68.]

An extremely emphatic indication of the intention of the parties to not include the building as a part of the property sold to Jim Dandy Markets is found from a consideration of the purchase price. The original agreement granted Jim Dandy Markets an option to purchase the fixtures and equipment for the sum of \$192,500.00 after paying rent for them for ten years at \$1,400.00 per month. [R. 38.] This option, by no stretch of the imagination, was to include the price of the buildings on the Atlantic and Ontario sites. Not only is this clear from the language used but the Atlantic building was not included in the Atlantic inventory. [R. 207.] The purchase negotiated at the end of one year instead of under the option at the end of ten years was at an in-

creased price of \$225,000.00. The reason for the increase is clearly explained in the testimony of Mr. Smith in response to the questions of the trial judge, that is, he would be deprived of nine years rent by selling the property at the time he did. [R. 304.] Not only is this reason unanswered in any manner; it is mathematically obvious.

Furthermore, as pointed out above in the recital of facts, the building was never mentioned by any of the parties at any of the negotiations for the supplementary and modified agreement, although, according to the testimony of Mr. Johnston, which is not questioned in any manner, the entire negotiations were over the establishment of the price to be paid for the privilege of immediately exercising the option. [R. 289 and 290.] If the buildings were to be added to the inventory of the property sold, it is inconceivable that they would not have been mentioned in the price negotiations. The price was increased from \$192,500.00 under the option [R. 38] to \$225,000.00 in the supplementary and modified agreement [R. 66], an increase of \$32,500.00. The adjuster's agreement fixed the value of the Atlantic store building when it was destroyed by fire at \$32,476.92. [R. 194.] If it were the intention to transfer the Atlantic store building with the fixtures and equipment, then Smith was actually reducing the amount to be paid below the option price instead of getting some compensation for the loss of rent as he testified. [R. 304.] Furthermore, the building at Ontario was in the same category. [R. 285.] There is no evidence as to the value of that building, but, at least argumentatively, it can be suggested and undoubtedly the court will take judicial notice of the fact that it had at least a reasonable value. Whatever the value, it

would constitute an additional discount if it were to be transferred under the supplementary and modified agreement.

The insurance provisions in the contracts are further evidence that there was no intention to convey the building. Under the original agreement, Smith agreed to pay all taxes on the fixtures and equipment and keep them insured at his own expense. [R. 39 and 40.] Under the supplementary and modified agreement Jim Dandy Markets agreed to pay the taxes and the insurance with a loss clause payable to Smith. [R. 72 and 73.] This was done on the Atlantic fixtures and equipment. [R. 205.]

On the other hand, nothing is said in either agreement or anywhere about insurance on the store buildings. It was apparently taken for granted that as usual the lessor and owner would protect himself. Smith did so by insuring the buildings with the defendant Fireman's Fund Insurance Co. If the buildings were to be transferred, the contract would have provided that they be insured by Jim Dandy Markets with a loss payable clause, the same as the fixtures and equipment.

The original agreement and the supplementary and modified agreement contain the provisions which were negotiated and studied by the parties and therefore must be given the most weight in determining the intention of the parties. The assignment is merely an executing document. If the assignment of the lease had not been made, and it now became the duty of the court to make the assignment, the court would not transfer the title of the buildings to Jim Dandy Markets, but would only assign the ground lease.

There is nothing in any written or oral statement which shows an intention to transfer title to the building, except

under the general principle of law that an assignment of a lease usually carries all the appurtenances with it. To give this much weight to the assignment is to allow it to overcome the intention of the parties and is placing the particular words in the assignment above the general intent, both of which are contrary to the provisions of the California Code as above quoted.

The California Supreme Court, in bank, last June sustained the application of these rules in the case of *Simmons v. California Institute of Technology*, 194 P. 2d 521; 31 A. C. 244. The Court considered the two documents involved in the transaction and concluded that the word "employment" meant permanent employment although cases held that it only meant employment at will. The Court said the cases:

"furnish no obstacle to recognizing the contract actually made by the parties. These cases do not indicate that where the intent is discoverable pursuant to applicable rules it will not be given effect accordingly."

(2) THE BUILDING WAS PERSONAL PROPERTY AND NOT A PART OF THE LEASE.

The building on the Atlantic market was built there by defendant Smith. [R. 285.] The fact that it belonged to him and could be removed is explicitly set out in each of the two leases covering each of the two parcels of land on which the Atlantic market was situated. [R. 58 and 63.] The building is thus personal property, was not and never was a part of the realty or an appurtenance of the lease, and it was not conveyed by the assignment. Being personal property, any conveyance should be by bill of sale, but it was not one of the items listed in the bill of sale [R. 207] which was executed to convey the personal prop-

erty to be sold under the supplementary and modified agreement.

The California law clearly recognizes the right of the parties to thus make personal property out of what would otherwise be realty or a fixture. Thus the lessee, under a lease with a provision similar to the instant one, conveyed fox kennels and fencing by bill of sale and it was sustained in the case of *Clark v. Talmadge*, 74 P. 2d 825, 23 Cal. App. 2d 703.

The same rule applies to buildings as held in the case of *Bowman v. Union Trust Co.*, 106 P. 2d 913, 41 Cal. App. 2d 397.

(3) THE ASSIGNMENT WAS NOT CONSUMMATED.

The assignment was executed and placed in the escrow as provided in the supplementary and modified agreement. [R. 252.] The assignment itself provided [R. 87] as did the supplementary and modified agreement [R. 69] that the assignment shall not become effective and that the sublease should remain in effect and be cancelled and terminated only after delivery of the leases and assignments thereof from escrow. The assignments, together with the other papers, were still in escrow at the time of the fire. [R. 148.]

At the time of the fire, Jim Dandy Markets was the tenant of the property in question under the sublease from the defendant Smith. He had nothing but an expectancy to get the building after completing the payment of the purchase price for the personal property. There was no

contract to pay any purchase price for the lease or the building. If the building by any interpretation was to be transferred to Jim Dandy Markets, it was only because of the fact that it was appurtenant to the lease and went with the assignment.

If Jim Dandy Markets secured any interest in the building under the contract it is only a naked expectancy or option. Since the option had not been exercised and the expectancy had not arrived, defendant Smith still owned the insurable interest in the building as established by the recent California case of *Vierneisel v. Rhode Island Insurance Co.*, 175 P. 2d 63, 77 Cal. App. 2d 229, where the court said:

“In the present case the conditions of the escrow were not certain to happen and title did not pass until plaintiffs had complied with the conditions of the escrow and were entitled to receive the deed. Therefore, on the date of the fire the Ferreros were the legal owner of the property which was destroyed.”

In the case now being considered by the court, there was no assurance that Jim Dandy Markets would make all payments on the fixtures and equipment as provided in the supplementary and modified agreement and if it did not do so, defendant Smith could do nothing to enforce the contract so far as the assignment was concerned beyond a repossession of the realty.

Smith was the sole and unconditional owner of the property at the time of the fire and entitled to collect the insurance.

If the Assignment Is Construed as Conveying the Building and the Insurable Interest to Jim Dandy Markets, Then It Should Be Reformed as Having Been Executed by Mutual Mistake and Without Consideration.

The Civil Code of California provides as follows:

Section 3399. "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

Sec. 3400. "For the purpose of revising a contract, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement."

Sec. 3401. "In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be."

(1) THE MISTAKE OF THE PARTIES.

As pointed out in the statement of facts above, the building was never mentioned between defendant Smith and his agents and the Jim Dandy Markets or any of its agents. [R. 280, 281, 285, 291, 298.] It is also hereinbefore pointed out that at no time in any of the agreements or documents drawn in consummation of the agreements was there one word expressing an intention to convey or conveying the building. Jim Dandy Markets is of necessity only relying on the general legal principle that

the assignment of the lease carried the building with it. There can be no question but that any conveyance of the building was a mistake so far as defendant Smith was concerned and he testified directly to the fact that he did not understand and had no suspicion at any time that the assignment would convey the Atlantic market building. [R. 303, 304.]

There is no direct evidence of what the Jim Dandy Markets group had in their minds, either collectively or individually—they did not testify. The surrounding facts and circumstances conclusively show that they knew or “suspected” that Smith did not understand the building was to be transferred. The building was never mentioned; nothing was done to indicate that it was being treated differently than other buildings which were merely leased; the negotiations for the supplementary and modified agreement dealt only with price, and the mention of the transfer of the building would have given Smith another argument for increasing the price to a much greater extent; many other facts which have already been set out more completely lead to the same conclusions.

There is one additional bit of evidence which has not heretofore been mentioned—within a few days after the supplementary and modified agreement went into effect Jim Dandy Markets insured the building. Nothing was said to Smith about it and he was allowed to maintain insurance at the same time. As heretofore pointed out, the insurance on the fixtures and equipment was handled in the usual and business-like manner and provision therefor made in the agreements. If Jim Dandy Markets knew that this building was to be transferred and if they were not concealing and withholding such fact from Smith, they would have called attention to it and the insurance of

the building would have been provided for in the agreement in the usual and business-like manner.

It seems inescapable that Jim Dandy Markets knew or "suspected" that Smith did not know it could be claimed the building was to be transferred by the assignment of the lease.

In the case of *Baines v. Zuieback*, 191 P. 2d 67, 84 A. C. A. 609, 85 A. C. A. 75, the California courts sustained the reformation of a sublease and pointed out the difficulty of proving the defendant's state of mind and said:

"Whether appellant knew or suspected respondent's mistake was not susceptible of direct proof, except by the testimony of appellant. The mistake of respondents was clearly established. The circumstances and appellant's own testimony tended to prove that he 'knew or suspected' it."

Another California case reformed an agreement to sell the "Montecito Hotel" so as to include the furniture as well as the building in the case of *Bisno v. Herzberg*, 170 P. 2d 973, 75 Cal. App. 2d 235. The court points out that the rule that the evidence of mistake or fraud in the execution of a writing which is offered for reformation must be clear and convincing is not a requirement of unanswerable evidence and says:

"If a mere denial by a defendant that he was mistaken or that he had committed a fraud were sufficient as a matter of law to prevail against the testimony of the party who claims that the writing offered for reformation does not express the true agreement of the parties, rarely or never could a plaintiff in such an action prevail."

The Court then points out that the plaintiff's understanding was that the furniture was to be included, that there was discussion of income, etc., which was pertinent to the use of the hotel and then says:

"The fact that no mention was made by Herzberg in his conversation with Bisno and Snader of his desire to sell the furniture or of respondent's need of it, or the difficulty the latter might experience in acquiring such articles as would be indispensable to the conduct of the hotel—such facts supply inferences in support of the testimony of respondent."

(2) INTENTION OF THE PARTIES.

It has already been pointed out that, except for the legal effect of the assignment, it is clear that the intention is not to convey the building. The legal effect—not specific words—of a consummating document is meager support to convey a \$35,000.00 building without consideration. The mistake should be corrected by reforming the assignment to conform to the intent of the parties and so as to assign the ground lease only and leave the title of the building in defendant Smith. This in turn would create the insurable interest with him and the declaration of the Court should be accordingly so that defendant Smith can collect on his insurance policy from the Fireman's Fund Insurance Company.

(3) EQUITABLE AND CONSCIENTIOUS AGREEMENT.

It was heretofore pointed out in the discussion of the intention of the parties that if the building was conveyed, it would be utterly without consideration. This is of double importance in considering the revision of the contract because of Section 3400 of the Civil Code, set out

above. Following the dictate of that section, and presuming that all the parties intended to make an equitable and conscientious agreement, can only lead to the conclusion that there was a mutual mistake and that the assignment should be reformed so as to clearly not convey title to the building.

Argument Applied to Specification of Errors.

The argument has been addressed to the entire case and it is believed that no extended argument is necessary in applying it to the specification of errors except to point out wherein each applies under the argument already presented.

- (1) The first assignment of error is that the judgment is contrary to the law and the evidence and is covered in the entire argument.
- (2) That part of finding XII that the defendant Jim Dandy Markets was the sole and unconditional owner of the building is contrary to the evidence that it originally belonged to Smith and was not transferred.
- (3) That part of finding XVI that defendant Smith sold, assigned, and transferred all his rights in said building to Jim Dandy Markets is contrary to the evidence that Smith only subleased the building to Jim Dandy Markets and was still the lessor thereof at the time of the fire. Jim Dandy Markets was occupying the building as lessee.
- (4) That part of finding XVII that defendant Smith sold and assigned his interest in the building to Jim Dandy Markets is contrary to the evidence. He only subleased it to them.

- (5) That part of finding XVII that there was no other or different agreement between the parties than the written assignment and that said written assignment embodied the entire agreement is contrary to the evidence, which, without any dispute, shows a whole series of documents of which the assignment was only one.
- (6) That part of finding XVII that certain exhibits—the assignment of the lease, the supplementary and modified agreement, the escrow instructions, and the bill of sale—constituted the entire agreement between the parties is contrary to the evidence. The supplementary and modified agreement itself provides [R. 73] that the original agreement shall remain in full force and effect except as modified and there can be no reasonable contention that all the documents before the Court were each a part of a series of documents constituting one agreement.
- (7) That part of finding XIX that it was not true that defendant Smith did not consider the building as a subject of the proposed sale is contrary to the evidence as the only evidence on the subject is that the building was never discussed or mentioned in any manner whatsoever.
- (8) That part of finding XIX that it is not true that the value of the building was in nowise considered an element of the purchase price is contrary to the evidence for the reason that defendant Smith and the other witnesses testified without contradiction that the building was never considered.

- (9) That part of finding XIX that it is not true the assignment does not correctly contain the agreement is contrary to the evidence for all the reasons set out above showing the intention of the parties, etc.
- (10) That part of finding XIX that it is not true that Smith did not intend to convey the building and that Smith did intend to convey it is contrary to the evidence. Smith's testimony in that regard is uncontradicted and unanswered and is in keeping with the evidence shown in the documents themselves.
- (11) That part of finding XIX that it is true that defendant Smith did intend to convey and did convey his title and interest in the building is contrary to the evidence because of his own testimony which is uncontradicted but is supported by the documentary evidence before the Court.
- (12) That part of finding XX that it is true that the Jim Dandy Markets on January 14, 1947, was the sole and unconditional owner of the leasehold including the right to the building on said premises is contrary to the evidence as the assignment of the leasehold had not been consummated and the building was never transferred.
- (13) That part of finding XX that it is not true that the assignment was executed under the mistaken belief that the building was not conveyed by said assignment is not true and is contrary to the evidence. Smith's testimony is to the contrary and uncontradicted.

Conclusion.

Giving full effect to the entire agreement and the intention of the parties as ascertainable therefrom, the assignment was of the ground lease only and did not convey the building from Smith to Jim Dandy Markets.

If a legal technicality caused the building to be transferred to Jim Dandy Markets because it happened to be resting on the land covered by the ground lease, then the assignment should be reformed so as to convey only the ground lease, as intended by the parties.

Giving full effect to the principles of equity and the direct provision of the Code, it must be presumed that all the parties to a contract intended to make an equitable and conscientious agreement. It is not equitable and conscientious to cause Smith's building to be conveyed from him to Jim Dandy Markets without any compensation whatsoever. Courts of equity were founded for the purpose of overcoming such harsh results from the application of technical provisions of law.

The entire record is before the Court and there is no issue to be retried and this Court should direct judgment that defendant Smith was the sole and unconditional owner of the building in question and entitled to collect his insurance thereon.

Respectfully submitted,

CLYDE THOMAS,

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Attorneys for Appellant E. F. Smith.

Dated: September 23, 1948.

No. 11982

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC., a Corporation; FIREMAN'S FUND INSURANCE COMPANY, a Corporation; and E. F. SMITH,

Appellees.

APPELLANTS' BRIEF.

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TOPICAL INDEX

	PAGE
Jurisdiction	1
Statement of the case.....	3
Specifications of error.....	10
Summary of argument.....	11
Argument	12
Point I. The defendant, E. F. Smith, had an insurable interest in the property covered by the plaintiffs' policies of insurance	12
Points II and III. The Jim Dandy Markets, Inc., upon completion of its agreement with defendant E. F. Smith was entitled to the benefit of the insurance collectible by the latter on his insurable interest in the property obtained by Jim Dandy Markets, Inc.....	15
Conclusion	24

TABLE OF AUTHORITIES CITED

CASES	PAGE
Brady v. Welsh, 204 N. W. 235.....	16, 19
Brakhage v. Tracy, 13 S. D. 343.....	15
Fageol T. & Co. v. Pac. Ind. Co., 18 Cal. 2d 731.....	14
Godfrey v. Alcorn, 215 Ky. 465, 284 S. W. 1094.....	20
Jordon v. Scott, 38 Cal. App. 739.....	14
Kaufman v. All Persons, 16 Cal. App. 388.....	16, 21, 23
Kleiber Motor Truck Co. v. Internatl. Ind. Co., 106 Cal. App. 708	14
McCollough v. Home Ins. Co., 155 Cal. 659.....	14
Millville Aerie v. Weatherby, 82 N. J. Eq. 455, 88 Atl. 847.....	19
Newark Fire Ins. Co. v. Turk, 6 F. 2d 533.....	18
Samuels v. Ottinger, 169 Cal. 209.....	13, 14
The Fidelity & Casualty Company of New York v. Fireman's Fund Indemnity Company, 38 Cal. App. 2d 1.....	18
Wellman v. Conroy, 50 Cal. App. 141.....	14
White v. Gilman, 138 Cal. 375.....	20
Young v. Kaufman, 172 Cal. 546.....	23

STATUTES

California Insurance Code, Sec. 281.....	12
Judicial Code, Sec. 24, amended (28 U. S. C. A., Sec. 41).....	2
Judicial Code, Sec. 128 (28 U. S. C. A., Sec. 225).....	2
Judicial Code, Sec. 274d (28 U. S. C. A., Sec. 400).....	1
Rules for the Circuit Court of Appeals, Ninth Circuit, Rule 20, Subsec. 2b	1

TEXTBOOKS

40 American Law Reports, p. 603.....	16
Couch on Insurance, Sec. 1979.....	15

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JIM DANDY MARKETS, INC., a Corporation; FIREMAN'S FUND INSURANCE COMPANY, a Corporation; and E. F. SMITH,

Appellees.

APPELLANTS' BRIEF.

Jurisdiction.

In compliance with Rule 20 (C. C. A. 9, Subsection 2b) appellants state that the statutory provisions believed to sustain the jurisdiction of the District Court to render judgment in this case and of this Court upon appeal to review the judgment are as follows:

United States Code Annotated, Title 28, Section 400 (Judicial Code 274d): DECLARATORY JUDGMENTS AUTHORIZED:

Procedure: (1) In cases of actual controversy (except with respect to Federal taxes) the courts of

the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.”

United States Code Annotated, Title 28, Section 41 (Judicial Code, Sec. 24, Amended): ORIGINAL JURISDICTION.

The district courts shall have original jurisdiction as follows:

1. UNITED STATES AS PLAINTIFF: CIVIL SUITS AT COMMON LAW OR IN EQUITY. *First.* “* * * or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States * * *.”

United States Code Annotated, Title 28, Section 225 (Judicial Code, Sec. 128): APPELLATE JURISDICTION.

(a) *Review of final decisions.* “The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—*First:* In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title.”

It was alleged in the complaint [R. p. 4] and the District Court found, that there is a diversity of citizenship between plaintiffs and all of the defendants, and that the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs of suit. [R. pp. 108, 109.]

Statement of the Case.

The Central Manufacturers' Mutual Insurance Company, a Corporation, and Indiana Lumbermen's Mutual Insurance Company, a Corporation, brought this action for declaratory relief against defendants Jim Dandy Markets, Inc., a Corporation; Fireman's Fund Insurance Company, a Corporation, and E. F. Smith, seeking a declaration of the respective rights, duties and liabilities of the plaintiffs and defendant, Fireman's Fund Insurance Company, under policies of fire insurance respectively issued by them, and for a determination by the Court as to the insurable interests in the premises and the proceeds of the policies as between defendant, Jim Dandy Markets, Inc., and defendant, E. F. Smith. [R. p. 9.]

Defendant, E. F. Smith, in addition to his answer to the complaint, filed a cross-complaint against defendant, Jim Dandy Markets, Inc., seeking the reformation of an assignment of a lease of the premises upon which the building covered by said fire insurance policies was located. [R. p. 43.]

The defendant Jim Dandy Markets, Inc., in addition to answering plaintiffs' complaint, filed its cross-claim against defendant E. F. Smith, praying that the rights of Jim Dandy Markets, Inc., and defendant E. F. Smith to the proceeds of any amounts recovered against defendant Fireman's Fund Insurance Company be fixed, determined and adjudicated. [R. p. 97.]

On July 1, 1945, defendant E. F. Smith entered into an agreement with Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership, doing business under the name and style of

Jim Dandy Markets, as to eight stores, including one known as the "Atlantic Store," for the sale and purchase of salable merchandise in each of said stores; the leasing of all store fixtures and equipment; the leasing or subleasing of the stores; and the sale and purchase of specified trucks and trailers. The partnership was subsequently incorporated and succeeded to by defendant Jim Dandy Markets, Inc. [R. p. 27.]

Jim Dandy Markets, Inc., entered into possession of said stores pursuant to said agreement and continued to occupy said property under this and a subsequent agreement of June 12, 1946, and was so occupying it at the time the premises known as the "Atlantic Store" were damaged by fire on January 14, 1947.

On June 12, 1946, defendants E. F. Smith and Jim Dandy Markets, Inc., entered into a supplementary and modified agreement, modifying the terms of the agreement of July 1, 1945, providing for the sale of all of the fixtures, machinery and equipment located and contained in all of the markets referred to in the agreement of July 1, 1945, and providing for the deposit in escrow of Bills of Sale of the fixtures, machinery and equipment located in the various markets; for the deposit in said escrow of the leases of named markets, including the "Atlantic Boulevard Market," together with a written assignment of each of the said leases; for the holding of said documents in said escrow until the full purchase price of the respective stores had been paid into said escrow, after which the Bill of Sale, together with the lease and assignment thereof of the respective markets were to be delivered to said Jim Dandy Markets, Inc., for cancellation as of the 1st day of July, 1946, of the lease on said fixtures, machinery

and equipment; for the cancellation and termination of the sub-leases of the various markets including the "Atlantic Boulevard Store" as of the date of delivery from escrow of the leases and assignments thereof. [R. p. 65.]

On July 19, 1945, the plaintiff Central Manufacturers' Mutual Insurance Company issued its standard California fire insurance policy whereby it insured the Jim Dandy Markets, Inc., against all loss or damage by fire in the amount of \$12,500 on the "Atlantic Boulevard Market" for the period from the 19th day of July, 1946, at noon, to the 19th day of July, 1949. [R. pp. 109 and 314.]

On July 19, 1945, plaintiff Indiana Lumbermen's Mutual Insurance Company issued its standard California fire insurance policy whereby, for the period from the 19th day of July, 1946, at noon, to the 19th day of July, 1949, it insured Jim Dandy Markets, Inc., against all loss or damage by fire to an amount not exceeding \$12,500, the premises described as One Story Composition Roof, D Class building at 6801 Atlantic Boulevard in the City of Bell, County of Los Angeles, State of California, including foundations, sidewalks, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales, machinery and elevators belonging to and constituting a part of said building (known and referred to throughout the trial as the "Atlantic Boulevard Market," and constituting one of the properties referred to in the various agreements between defendants Jim Dandy Markets and E. F. Smith.) [R. pp. 110 and 314.]

On the 5th day of July, 1945, defendant Fireman's Fund Insurance Company, issued its standard California

fire insurance policy insuring for three years defendant E. F. Smith against loss by fire of said building, known as the "Atlantic Store" in the amount of \$16,700. [R. pp. 113 and 314.]

On January 14, 1947, the "Atlantic Store" was damaged by fire in the amount of \$32,476.92, as determined by an Adjuster's Agreement entered into under date of April 9, 1947. [R. p. 193.]

As counsel for plaintiffs and cross-appellants Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company understand the state of the record, no question is raised on the following matters:

(a) That all payments which were due E. F. Smith at the date of the fire under the original or supplemental agreements were paid. [R. pp. 159 and 167.]

(b) That at the date of the fire, January 14, 1947, the various documents deposited in escrow had not been delivered, but remained in escrow. [R. p. 148.]

(c) That the premiums on the three policies of fire insurance companies hereinbefore referred to had been paid and the policies had not been cancelled. [R. pp. 154, 155 and 255.]

(d) That final payment by defendant Jim Dandy Markets, Inc., to the escrow under the agreement with defendant E. F. Smith, and delivery of the documents by Morrison Escrow Company, the escrow holder, occurred on or about March 19, 1947. [R. p. 164.]

(e) That defendant Jim Dandy Markets, Inc., succeeded to all of the rights of the partnership in Jim Dandy Markets, Inc., a Corporation. [R. p. 114.]

(f) That defendant E. F. Smith was the lessee of the property known as the "Atlantic Boulevard Store" under a lease dated September 29, 1941, executed by Charles E. Kindig and Daisy Kindig for a term of five years beginning August 1, 1942, until August 1, 1947. On February 1, 1942, defendant E. F. Smith entered into another lease for the same period with Thomas A. McLenaghan, as Administrator of the estate of E. T. Williams, deceased, an owner of a part interest in said building. [R. p. 111.]

By the provisions of the lease of September 29, 1941, it was provided:

FIFTH: "It is understood that the improvements now on the premises are the property of the Lessee, and it is agreed by the Lessor that these and all other improvements placed on the said property during the term of this lease by the Lessee shall belong to the Lessee and may be removed by him at the expiration of the said term." [R. p. 58.]

The "Atlantic Store" was erected by the lessee, defendant E. F. Smith, prior to the negotiations with Jim Dandy Markets, Inc., and its predecessors in interest. [R. pp. 285, 231 and 228.]

On the issues thus joined the Honorable District Court, at the conclusion of the trial found, among other things, that at no time subsequent to said June 27, 1946, did the said E. F. Smith have any interest in said building other than a lien for the payment of the balance of the purchase price thereof, and at the time of the fire on January 14,

1947, the defendant E. F. Smith was not the owner of said building, and had, on said January 27, 1946, changed his interest, title and possession in and to said building. [Finding XVI, R. p. 122.]

The Court found further that the written agreement entered into between the defendant E. F. Smith and the predecessors in interest of the defendant Jim Dandy Markets, Inc., constituted the entire agreements between said parties, and that said agreements correctly expressed the intention of the parties thereto, and that there was no mistake, either mutual or otherwise, in the drafting of said agreements, including said assignment which intended to and were effective in conveying from the defendant E. F. Smith to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all the right, title and interest to said building known as 6801 Atlantic Boulevard, Bell, California, subject only to the right of said defendant E. F. Smith to receive payment as in said agreements provided. [Finding XVII, R. p. 123.]

In accordance with the Findings and Conclusions of law based thereon, judgment was accordingly entered, adjudging that the defendant Jim Dandy Markets, Inc., have and recover from the plaintiff Central Manufacturers' Mutual Insurance Company, a Corporation, the sum of \$12,500.00 with interest thereon at the rate of seven per cent (7%) per annum from the 9th day of May, 1947, until paid, and its costs therein.

That the defendant Jim Dandy Markets, Inc., have and recover from the plaintiff Indiana Lumbermens' Mutual Insurance Company, a Corporation, the sum of \$12,500.00, with interest thereon at the rate of seven per cent (7%) per annum from the 9th day of May, 1947, until paid, and its costs therein.

That any loss to the defendant Jim Dandy Markets, Inc., by reason of the destruction of said building by fire is not apportionable between the plaintiffs and the defendant Fireman's Fund Insurance Company under the policy of insurance between Fireman's Fund Insurance Company and the defendant, E. F. Smith.

That there was no showing of mutual mistake or any mistake in the execution of said assignment.

That defendant, Jim Dandy Markets, Inc., is not entitled to the proceeds, if any, of the insurance policy issued to the defendant E. F. Smith by the defendant Fireman's Fund Insurance Company and that the defendant Fireman's Fund Insurance Company was entitled to go hence and have and recover of plaintiffs its costs and disbursements herein. [R. p. 128.]

Specifications of Error.

Appellants respectfully submit that the Honorable District Court erred:

1. In finding that the defendant E. F. Smith did not have any interest in said building other than a lien for the payment of the balance of the purchase price thereof, and at the time of the fire on January 14, 1947, was not the owner of said building. [R. p. 122.]

2. In adjudging that the defendant Jim Dandy Markets, Inc., was not entitled to the proceeds of the insurance policy issued to the defendant E. F. Smith by the defendant Fireman's Fund Insurance Company. [R. p. 130.]

3. In adjudging that the loss to the defendant Jim Dandy Markets, Inc., by reason of the destruction of said building is not apportionable between the plaintiffs and defendant Fireman's Fund Insurance Company and defendant E. F. Smith. [R. p. 130.]

4. In adjudging that the defendant Jim Dandy Markets, Inc., was the sole and unconditional owner of the building known as the "Atlantic Store" in contemplation of the terms and conditions of the policies executed and delivered by the plaintiffs herein. [R. p. 129.]

Summary of Argument.

POINT I: The defendant E. F. Smith had an insurable interest in the property covered by the plaintiffs' policies of insurance, and the policy issued by defendant Fireman's Fund Insurance Company.

POINT II: The Jim Dandy Markets, Inc., as vendee, upon completion of its agreement with defendant E. F. Smith was entitled to the benefit of the Fireman's Fund Insurance Company's insurance collectible by E. F. Smith on his insurable interest in the property.

POINT III: By subrogation and on principles of equity plaintiffs were entitled to have the insurance collectible by the defendant E. F. Smith applied on the purchase price upon the completion of the sale subsequent to the fire.

ARGUMENT.

POINT I.

The Defendant, E. F. Smith, Had an Insurable Interest in the Property Covered by the Plaintiffs' Policies of Insurance.

An insurable interest is defined in Section 281 of the California Insurance Code as follows:

“Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.”

The various documents by which the defendant, Jim Dandy Markets, Inc., acquired the interest of defendant, E. F. Smith, in the “Atlantic Store” are enumerated in paragraph 11 of the Court’s Findings of Fact. [R. p. 119.]

These were delivered by the Morrison Escrow Company to the defendant, Jim Dandy Markets, Inc., on or about July 30, 1947 [R. p. 119], although the fire occurred on January 14, 1947.

These documents consisted of:

(a) Lease dated September 29, 1941, between E. F. Smith as Lessee and Charles E. Kindig and Daisy Kindig as Lessors;

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee and Thomas A. McLenaghan, as Administrator of the Estate of E. T. Williams;

(c) Bill of Sale dated June 27, 1946, executed by E. F. Smith in favor of Jim Dandy Markets, a partnership;

(d) Assignment of Lease dated June 27, 1946, which assignment was set out at length in Finding X of the Honorable Trial Court. [R. p. 116.]

Although it is seen that this assignment was not delivered until the 30th day of July, 1947, the Honorable Trial Court found in Finding XVI [R. p. 122] that

“at no time subsequent to said June 27, 1946 (the date of the assignment) did the said E. F. Smith have any interest in said building, and had, on said January 27, 1946, changed his interest, title and possession in and to said building.”

It is the contention of the appellants that the liability which defendant E. F. Smith incurred as lessee under the original leases, and the liability which he continued under as surety subsequent to the execution of the assignment was sufficient to give him an insurable interest in the property covered by plaintiffs' insurance policies and the policy executed by Fireman's Fund Insurance Company in favor of defendant E. F. Smith.

Samuels v. Ottinger, 169 Cal. 209 at page 212:

“The effect of the assignment is to make the lessee a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal bound, whilst he is assignee, to pay the rent and perform the covenants.”

Thus, the privity of contract between the lessors and defendant E. F. Smith was not terminated by the assignment executed by the latter, but continued until the end

of the term, unless terminated in some legal manner, and the fact that the lessors may consent to the assignment and accept the assignees as tenants is immaterial as is also the lessors' acceptance of rent from the assignees.

Samuels v. Ottinger, 169 Cal. 209;

Wellman v. Conroy, 50 Cal. App. 141;

Jordon v. Scott, 38 Cal. App. 739.

If it be assumed as the Honorable Trial Court found [R. p. 122] that

“at no time subsequent to said June 27, 1946, did said E. F. Smith have any interest in said building other than a lien for the payment of the balance of the purchase price thereof * * *,”

then the equitable interest therein retained by defendant E. F. Smith was sufficient to give him an insurable interest in the property.

McCollough v. Home Ins. Co., 155 Cal. 659:

While in the case just cited the equitable interest was found to be in the purchaser, the principle of law is equally applicable to a vendor as was recognized in the case of *Fageol T. & Co. v. Pac. Ind. Co.*, 18 Cal. 2d 731, holding that a vendor under a conditional sales contract has an insurable interest in the chattel sold by such contract.

To the same effect *Kleiber Motor Truck Co. v. Internatl. Ind.' Co.*, 106 Cal. App. 708.

POINTS II and III.

The Jim Dandy Markets, Inc., Upon Completion of Its Agreement With Defendant E. F. Smith Was Entitled to the Benefit of the Insurance Collectible by the Latter on His Insurable Interest in the Property Obtained by Jim Dandy Markets, Inc.

This appears to follow from the principle of law that a vendor who collects fire insurance on the property between the time of effecting a contract of sale and delivery of a deed, acts as trustee for the vendee, and upon the payment of the purchase price is entitled to the insurance money in equity.

Couch on "Insurance," Sec. 1979, states:

"Although the vendee has been held to have no right of action against the insurance company, if property is destroyed between the time of effecting the contract for the sale and the delivery of the deed, the proceeds of an insurance policy upon such property belong to the vendor, as between him and the company, but the former is held to act as trustee for the vendee, and must, therefore, account to his *cestui que* trust in equity. In other words, where insured property is destroyed after the making of the contract of sale, but before the payment of the purchase money and the execution of the conveyance, the proceeds of the insurance belong to the vendor, as between him and the company; but he acts as trustee for the vendee, who, upon payment of the purchase price, is entitled to the insurance money in equity, although he intended to tear the buildings down."

In *Brakhage v. Tracy*, 13 S. D. 343, it was held in a case when insurance was obtained appellant held the policy

for the benefit of himself to the extent of his interest in the land, and payment of the price agreed upon according to the terms of the contract is all he can rightfully demand. Confessedly, he entered into a valid contract to sell and convey the real estate described in the complaint for the consideration which respondent, without any default, stands ready to pay, less the amount received by him from the insurance company in settlement of a loss which she alone has sustained. It was held, therefore, that the purchaser was entitled upon a tender of the unpaid purchase money, less the amount of insurance money collected by the vendor, to receive a deed to the property.

In *Kaufman v. All Persons*, 16 Cal. App. 388, where the buildings were burned while in the possession of the purchaser, but before she had completed her payments, it was held the vendor was not entitled to use the insurance money for the purpose of clandestinely satisfying the unpaid balance of the mortgage and acquiring from the mortgagee a reconveyance of the property so as to prevent the purchaser from completing her payments to and receiving the vendor's deed from the escrow agent. In other words, the purchaser was entitled to have the insurance applied for her benefit upon the obligation which she was to assume in the purchase.

In *Brady v. Welsh* (204 N. W. 235), it was held that a vendor who receives insurance money paid to him in settlement of the loss of a building by fire upon premises sold by him under an executory contract to convey, after full payment of the purchase price, holds and retains the sum as trustee for the vendee.

In a note in 40 *A. L. R.* 603, following the last case, it is stated that in accordance with the rule laid down,

where the loss would, in the absence of insurance, fall upon the purchaser, the latter, may, if ready, able, and willing to complete his contract, require the insurance money to be used towards the reduction of the unpaid purchase money, although the contract was silent as to insurance.

With reference to the decision of the Honorable District Court that the loss by reason of the destruction of said building by fire is not apportionable between the plaintiffs and the defendant Fireman's Fund Insurance Company [R. p. 130], counsel for appellants Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company do not contend that the loss should be apportioned by virtue of the pro rata clauses of the respective policies. This clause provided:

“This Company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, or expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property, whether valid or not, or by solvent or insolvent insurers.” [R. pp. 7 and 314.]

As the Honorable District Court properly pointed out in the Decision and Order [R. p. 102], where two insurance companies fully insure the same risk and one company pays the total loss, that company may force contribution from the other, but where both policies contain a pro rata or coinsurer clause, neither company may recover or claim contribution from the other, and neither can recover from the other any amount that it may have paid in excess of its pro rata share of the insurance. Such was the hold-

ing in *The Fidelity & Casualty Company of New York v. Fireman's Fund Indemnity Company*, 38 Cal. App. 2d page 1.

Nor could contribution be claimed unless the policies cover the same interest, as decided in the case of *Newark Fire Ins. Co. v. Turk*, 6 F. 2d 533.

It is obvious, of course, that the insurance provided by the plaintiffs covered the interest of defendant Jim Dandy Markets, Inc., while the insurance issued by the defendant, Fireman's Fund Insurance Company, covered the interest of defendant E. F. Smith as vendor, and the interest which, as has been seen, he retained under the incompleated escrow instructions and the assignment of the leases.

Counsel for appellants do contend, however, that as purchaser under a valid contract of purchase of premises subsequently destroyed by fire, the defendant Jim Dandy Markets, Inc., was entitled to the benefit of the insurance collectible by defendant E. F. Smith from the defendant Fireman's Fund Insurance Company. That said E. F. Smith under the weight of authority, clearly had an insurable interest in said premises and that the Honorable Trial Court should have so found and decided in construing plaintiffs' liability as prayed for in the action for declaratory relief, and should have determined that the plaintiffs were entitled to have their loss reduced to that extent by subrogation to the rights of defendant Jim Dandy Markets, Inc., and that such result depends upon recognized principles of equity and not the application of the pro rata clause of the several policies.

As said by the Court in *Millville Aerie v. Weatherby*, 82 N. J. Eq. 455, 88 Atl. 847:

“As purchaser under a valid contract of purchase, vendee became the equitable owner of the property, in equity the property is regarded as belonging to him; the vendor retaining the legal title simply as trustee and as security for the unpaid purchase money. By reason of this equitable relation of the parties to a contract of sale of land, it has been determined by the great weight of American authority that money accruing on a policy of insurance, where the loss has occurred subsequent to the execution of the contract, will in equity, inure to the benefit of the vendee; the vendor still retaining his character as trustee, and the insurance money in his hands representing the property that has been destroyed.”

To the same effect *Brady v. Welsh*, decided in the Iowa Supreme Court on June 25, 1925, 204 N. W. 235, in which the authorities are reviewed at considerable length, the Court said:

“There can be no question under all of the authorities but that both the vendor and vendee in a contract of sale, by the terms of which the equitable title passes to the vendee, have an insurable interest in the property. Depreciation in the value thereof, whether by reason of fire which consumes the buildings or by other causes, must be borne by the vendee; likewise any appreciation in value of the property belongs to him. The only loss suffered by appellee herein was such depreciation in his security as resulted from the destruction of the building by fire. He has been paid the full purchase price of the farm, and, if permitted to retain the money received by him as

insurance, he will profit to that extent. The rule that the vendor who receives insurance money paid to him in settlement of the loss of a building by fire, upon premises sold by him under an executory contract to convey after full payment of the purchase price, holds and retains the same as trustee for the vendee, is a wholesome one, and tends to effect justice between the parties.”

In *Godfrey v. Alcorn*, 215 Ky. 465 (284 S. W. 1094), a vendor, having insured in her name a house in the possession of a purchaser, and the house having been destroyed before the purchaser paid all of the purchase price, it was held that payment of the insurance to the vendor insured to the benefit of the purchaser and extinguished his liability upon the unpaid balance of that amount on the purchase-money note.

The cases cited above have recognized that authorities are not unanimous in their conclusion as to the respective rights of the vendor and the vendee in insurance obtained by the vendor.

The California Supreme Court in the case of *White v. Gilman*, 138 Cal. 375, decided that the plaintiff vendee had no interest in the insurance money paid to the defendant and could not require that any part of it could be applied to the satisfaction of defendant's claim of the unpaid purchase money. It would appear that the balance owed on the purchase agreement was less than the amount received by the defendant from the insurance company, but the California Supreme Court reversed an order denying a motion for a new trial, granted the same

in an action brought by the plaintiff to complete the conveyance of the real estate by the vendor defendant.

This case, however, seems contrary to the holding in *Kaufman v. All Persons, etc.*, 16 Cal. App. 388, tried in the Third Appellate District, June 13, 1911. In this case an agreement to sell land provided for an option to purchase, and that the sum paid thereon was to be credited on purchase money, and that upon payment of the amount due from the vendor to a national bank, at which a deed in escrow was placed, it should be delivered to plaintiff and that the residue of the purchase price was to be paid in monthly installments, under a deed of trust from the vendor to a savings and loan society, until the debt thereto should be fully paid. It appeared that the vendor was required by the savings and loan society to have the improvements insured for its benefit, and to make any loss payable thereto, and the purchaser had been expressly required to assume the whole indebtedness payable thereto, and the property having been expressly bought subject to the deed of trust to that society, the purchaser was entitled, in case of loss by fire, to have the proceeds of the policy credited on the payments assumed by her.

The Court said at page 397:

“We know of no just principle by which appellants can sustain their contention that the money due from and paid by the insurance company upon the policy underwritten on the building on the premises involved in this controversy should inure wholly to their benefit and not to that of plaintiff. Said building, it

will be recalled, was destroyed by fire after the plaintiff and defendants had entered into the contract of option, and subsequently to the execution and delivery to the Crocker-Woolworth Bank of the deed in escrow. The argument advanced in support of this proposition is that the policy not having been transferred or assigned to the plaintiff, the money due thereunder, upon the destruction of the building, cannot be claimed by her, but was the property of the defendants. In order to vest her with any interest in or right to said money, or to have it credited for her benefit on the note held by the savings society, so the argument goes, the policy must necessarily have previously been assigned to her by the defendant.

* * *

“By the agreement of sale, plaintiff acquired an equitable title to the property and with such title she necessarily acquired an equitable interest in the insurance policy—that is to say, the policy having been assigned or made payable to the savings society as security for the obligation which she had agreed to assume and extinguish, she, upon purchasing the property, thus acquired the right to have the money derived from said policy, in case of the destruction by fire of the building upon which it was underwritten, applied, for her benefit, upon the obligation so assumed. The rule as thus stated is expressly recognized by the very case cited by appellants (*Gilbert v. Port*, 28 Ohio St. 296, *et seq.*), wherein the following statement of the rule by Sugden on Vendors, eighth American edition, 291, chapter 7, section 2, is

approved: 'A vendee, being the equitable owner of the estate from the time of the contract of sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and, on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim, although this was not always the rule. But now, if after the contract, and before the conveyance, the houses were burned down, the loss will fall upon the purchaser, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving the notice to the vendee.' And the Ohio court, in the case mentioned, concludes, from all the authorities and upon principle, that 'the vendee, because he is the equitable owner, and, as such, is compelled to sustain the loss, occurring *after the sale and before the conveyance*, is entitled to any benefit that may accrue to the estate.' "

The judgment in favor of the plaintiff and the order denying defendants a new trial was affirmed.

In the companion case *Young v. Kaufman*, 172 Cal. 546, decided in the Supreme Court on May 15, 1916, the Supreme Court affirmed a judgment in favor of the defendant, and denied a motion for a new trial in an action in which the same vendor sued to recover a balance alleged to be due on the purchase price of the land, but did so apparently on the ground that the previous decision in *Kaufman v. All Persons*, 16 Cal. App. 388, was *res adjudicata*.

Conclusion.

For the foregoing reasons and on the authorities cited, counsel for appellants believe that the unquestioned weight of authority is that defendant E. F. Smith did have an insurable interest in the "Atlantic Boulevard Market"; that the defendant Jim Dandy Markets, Inc., as vendee was entitled to the benefit of the vendor's insurance, thus reducing the amount to be paid by him on the purchase contract, in effect reducing the loss which the appellants Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company should be called upon to pay under the coverage afforded by their policies, and that the judgment below should be amended accordingly.

Respectfully submitted,

THOMAS P. MENZIES, and

HAROLD L. WATT,

By HAROLD L. WATT,

Attorneys for Appellants.

No. 11982.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. F. SMITH,

Appellant,

vs.

JIM DANDY MARKETS, INC., FIREMAN'S FUND INSURANCE COMPANY, CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellees,

and

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC.,

Appellee.

REPLY BRIEF OF APPELLEE, JIM DANDY MARKETS, INC. TO APPELLANT SMITH'S OPENING BRIEF.

OCT 25 1948

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TOPICAL INDEX

	PAGE
A.	
Statement of the case.....	1
Argument	18
Point I. The assignment of lease did convey to Jim Dandy Markets, all rights that Smith had in the leases assigned, including the building.....	18
Point II. The assignment should not be reformed as there is no showing of any ground for reformation.....	22
Conclusion	26

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bewick v. Mecham, 26 Cal. 2d 92, 156 P. 2d 757.....	20
California Trust Company v. Cohn, 9 Cal. App. 2d 33, 48 P. 2d 744	26
Goodfellow v. Barritt, 130 Cal. App. 548, 20 P. 2d 740.....	26
Harding v. Robinson, 175 Cal. 534, 166 Pac. 808.....	25
Methodist Episcopal Church v. Seitz, 74 Cal. 287, 15 Pac. 839....	18
Meyerstein v. Burke, 193 Cal. 105, 222 Pac. 810.....	24
Miller v. Lantz, 9 Cal. 2d 544, 71 P. 2d 585.....	26
Moore v. Vandermast, 19 Cal. 2d 94, 119 P. 2d 129.....	26
Wong v. Stuyvesant Insurance Co., 100 Cal. App. 109, 279 Pac. 1050	21

STATUTES

Civil Code, Sec. 3399.....	22
Civil Code, Sec. 3400.....	22
Civil Code, Sec. 3401.....	22

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Appellants,

vs.

JIM DANDY MARKETS, INC.,

Appellee.

REPLY BRIEF OF APPELLEE, JIM DANDY MARKETS, INC. TO APPELLANT SMITH'S OPENING BRIEF.

A.

STATEMENT OF THE CASE

On the 29th day of September, 1941, Charles Kindig and wife, as lessors, entered into a lease with appellant Smith upon certain real property situated in the City of Bell, hereinafter referred to as "ATLANTIC STORE" [R. 56

to 60]. Said lease was for the term of five years from the 1st day of August, 1942 to the 1st day of August, 1947, and granted Smith an option to extend the term from August 1, 1947, to August 1, 1952.

Paragraph Five of the Kindig lease contains the following:

“It is understood that the improvements now on the premises are the property of the Lessee, and it is agreed by the Lessor that these, and all other improvements placed on the said property during the term of this Lease by the Lessee shall belong to the Lessee, and may be removed by him at the expiration of said term.”

Paragraph Eight of the Kindig lease reads as follows:

“The expressions, terms, conditions, requirements and obligations of this Lease are binding upon, and shall inure to the benefit of the parties hereto, their heirs, administrators and successors in interest, and shall be construed covenants running with the land.”

On the 1st day of February, 1942, Thomas A. McLenaghan, as Administrator of the Estate of E. T. Williams, deceased, as lessor, entered into a lease with appellant Smith as lessee, upon certain real property situated in the City of Bell [R. 60 to 64], and the property described in said lease will likewise be referred to as the “ATLANTIC STORE,” by virtue of the fact that the two parcels of property described in the above leases adjoin each other.

The McLenaghan lease was for five years, commencing on the 1st day of August, 1942, and ending on the 1st day of August, 1947. The lease contains the following provision:

“It is understood that the improvements now on the premises are the property of, and belong to the

Lessee, and it is agreed by the Lessor that these, and all other improvements placed on the said premises by the Lessee during the term of this Lease, or any extension of said Lease, shall belong to the said Lessee and may be removed by him at the expiration of the term."

The lease likewise contains a provision giving Smith an option to extend the lease for four years and six months, to-wit: from August 1, 1947 to February 1, 1952.

The McLenaghan lease also contains the following provision:

"The expressions, terms, conditions and obligations of this Lease are binding upon, and shall inure to the benefit of the parties hereto, their heirs, administrators and successors in interest, and shall be construed covenants running with the land."

On the 1st day of July, 1945, and for some time prior thereto, Charles Schuster, Leo A. Goldberg, Max M. Berick, Earl I. Swetow and Norman Schuster were co-partners, doing business under the firm name and style of "Jim Dandy Markets," and on the 1st day of July, 1945, Jim Dandy Markets entered into an agreement with appellant Smith [R. 27 to 40]. For the convenience of the Court an analysis of said agreement follows:

"RECITALS.

Smith is the owner of eight stores, four of which he owns outright, and four of which he leases. He owns the merchandise and all fixtures and equipment, including office equipment, and Jim Dandy desires to

lease the same from Smith for ten years. The four buildings he owns are known as:

- A. Central Avenue Store
- B. Figueroa Street Store
- C. Nowalk Store
- D. Western Avenue Store

which store buildings Jim Dandy desires to lease for ten years from July 1, 1945, and Smith is willing to lease said stores for said period.

The stores held under lease by Smith are known as:

- A. Watts Store
- B. Atlantic Store
- C. Ontario Store
- D. Sixth Street Store

and Smith is desirous of sub-leasing them to Jim Dandy, but the leases do not run for a full ten years, and Jim Dandy will sub-lease the stores from Smith for the balance of the terms, including the term referred to in options in said leases.

Smith has a lease on the lot adjacent to the Figueroa Street Store for parking automobiles, which lease expires on May 31, 1947, and Jim Dandy wants this lease.

Smith is the owner of certain licenses, and is desirous of transferring the licenses to Jim Dandy.

Smith is the owner of 7 trucks and 4 trailers which Jim Dandy wants to buy.

Jim Dandy, as additional consideration, and as security for the performance of the Agreement, and of the payment of the rent on the leases, shall make an advance payment to Smith of \$50,000.00, as evidence of good faith.

Jim Dandy is desirous of securing an option for the purchase of the fixtures and equipment in the markets at the expiration of ten years, and Smith is willing to give the option.

Jim Dandy wants to buy, and Smith is willing to sell the goodwill of his business.

“AGREEMENT PROVISIONS.

1. Smith agrees to sell all saleable merchandise in the 8 stores through an escrow to be started with Haas Baruch & Co., the purchase price to be paid into the escrow, and the purchaser can do business under the name of E. F. Smith Public Markets, or under the trade name of the purchaser.

2. Smith is to transfer ration points or ration credits to Jim Dandy.

3. Smith leases to Jim Dandy all store fixtures and equipment, including office equipment owned by him for a period of ten years, at a rental of \$1,400.00 per month. Title to the fixtures is to remain in Smith.

4. Smith agrees to enter into a 10-year Lease from July 1, 1945, for the following stores owned by him:

- | | |
|-------------------------|--------------------|
| A. Central Avenue Store | \$550.00 per month |
| B. Figueroa Store | \$400.00 per month |
| C. Norwalk Store | \$200.00 per month |
| D. Western Avenue Store | \$650.00 per month |

Certain concessions in the stores are under lease, or under a month to month tenancy, and will be assigned to Jim Dandy.

5. Smith agrees to sub-lease to Jim Dandy, stores known as:

1. Watts Store
2. Atlantic Store
3. Ontario Store
4. Sixth Street Store

for 10 years, provided Smith is able to, upon the expiration of his Leases on said stores, re-lease at a rental not in excess of the present rental, but if the rent is higher, he will not take new leases unless it is satisfactory to Jim Dandy.

6. The parties understand that the Leases Smith has on the 4 stores expire prior to June 30, 1955. If Smith gets extensions, he must give such extensions to Jim Dandy. If Smith cannot get extensions, there shall be a reduction in the monthly rental to be paid by Jim Dandy for the fixtures, as follows:

- A. Watts Store. Rental on Sub-Lease shall be reduced by \$500.00 per month, and the rent on the fixtures and equipment shall be reduced by \$200.00 per month.
- B. Atlantic Store. Rental on the Sub-Lease shall be reduced by \$320.00 per month, and the rent on the fixtures and equipment shall be reduced by \$200.00 per month.
- C. Ontario Store. Rental on Sub-Lease shall be reduced by \$205.00 per month, and the rent on the fixtures and equipment shall be reduced \$200.00 per month.
- D. Sixth Street Store. Rental on the Sub-Lease shall be reduced by \$600.00 per month, and the rent on the fixtures and equipment shall be reduced \$150.00 per month.

7. In the event the Leases cannot be extended, or new leases secured, Smith can sell the fixtures in such stores, and the option price hereafter granted shall be reduced in proportion, said reductions to be mutually agreed upon.

8. In the event any and all of the leases cannot be renewed, or new leases secured by Smith, Jim Dandy shall not take leases in their own name.

9. There is a parking lot adjoining the Figueroa Store, which will be assigned to Jim Dandy.

10. Smith will assign to Jim Dandy all licenses issued to him.

11. Smith agrees to sell 7 trucks and 4 trailers, and Jim Dandy will pay \$7,500.00 for them.

12. As security Jim Dandy will pay to Smith \$50,000.00, to be applied upon the last year's rental. If they faithfully carry out the agreement, Smith will pay 6% interest on the \$50,000.00.

13. Smith gives Jim Dandy the option to buy the fixtures and equipment in all of the stores for \$192,500.00 cash. The option cannot be exercised until the expiration of 10 years. Jim Dandy must give 90 days notice before the expiration of 10 years, that it wants to exercise the option.

14. Jim Dandy is not to assign any of the Leases or subleases without the consent of Smith.

15. Smith agrees to furnish Jim Dandy with any records relative to the purchase of merchandise, and other records, and agrees not to engage in business in the County of Los Angeles, or in the City of Ontario, during the term of the Contract.

16. Smith is to pay all taxes against the fixtures, and is to keep them insured at his own expense."

On or about the 1st day of July, 1945, appellant Smith, as sub-lessor and Jim Dandy Markets, as sub-lessee, entered into a sub-lease for said "ATLANTIC STORE" [R. 195 to 203].

At 7:00 A. M. on July 5, 1945, Jim Dandy Markets went into possession of all the stores mentioned in the above leases, and into possession of the buildings, fixtures, equipment and merchandise in said stores, including the "ATLANTIC STORE."

On July 5, 1945, the appellee Fireman's Fund Insurance Company, hereinafter referred to as "Fireman's Fund," issued its policy of fire insurance, No. A-959495, under which appellant Smith was named as the insured, and said policy covers, among other properties, the "ATLANTIC STORE."

Thereafter, while Jim Dandy Markets was in possession of the "ATLANTIC STORE," including the building and fixtures therein and thereon, a "SUPPLEMENTARY AND MODIFIED AGREEMENT" was, on the 12th day of June, 1946, entered into between Smith and Jim Dandy Markets [R. 65 to 73]. For the convenience of the Court an analysis of the Agreement follows:

"RECITALS.

The parties desire to amend the Agreement of July 1, 1945.

AGREEMENT PROVISIONS.

1. Smith agrees to sell to Jim Dandy, all fixtures, machinery and equipment in the 8 markets, for the sum of \$225,000.00, and, that of the \$50,000.00 deposited under the July 1, 1945 Agreement, \$30,000.00 thereof shall be applied on the \$225,000.00,

and the balance of \$195,000.00 shall be paid in installments of \$5,000.00, or more, commencing on August 1, 1946, together with 6% interest, payable monthly.

2. The \$20,000.00 remaining of the \$50,000.00 shall be held by Smith as security for the performance by Jim Dandy of the leases on the following 4 markets:

1. Central Avenue
2. Western Avenue
3. Figueroa Street
4. Norwalk

and if Jim Dandy complies with the terms of the leases, Smith will retain the \$20,000.00 and give Jim Dandy free rental during the last 11 months of the Lease on the Central Avenue Market, Western Avenue Market and Figueroa Street Market, and 12 months free rental on the Norwalk Market, and Smith is to pay interest at 6% on the \$20,000.00, commencing July 1, 1946, and payable annually commencing July 1, 1947.

3. Concurrently with the signing of the "SUPPLEMENTARY AND MODIFIED AGREEMENT," an escrow shall be opened and Smith will deposit the following:

a. Separate Bill of Sale to the fixtures, machinery and equipment located in the 8 markets.

b. Bill of Sale covering all office furniture, fixtures and equipment in the 8 markets.

c. Smith will deposit in the escrow, the original leases upon the following markets:

Ontario	Watts
Atlantic	Sixth Street

together with a written assignment of each of said leases in favor of Jim Dandy, where such assignment is permitted. Where written consent to assignment is required, Smith will deliver such assignment if permission is secured, but if permission to assign cannot be obtained, then any existing sub-leases on such markets between Smith and Jim Dandy shall remain in force and effect, but Jim Dandy shall have the right to assign the sub-leases when it has deposited in escrow the money required by Paragraph 4 of the amended agreement.

The Lease in existence upon the fixtures, machinery and equipment between Smith and Jim Dandy, shall be cancelled as of the 1st day of July, 1946, and all rental shall cease as of said date.

With reference to the Leases and the assignments thereof to be deposited in escrow by Smith, the sub-leases shall be deemed cancelled and terminated as of the date of delivery from escrow of the Leases and Assignments, as provided in Paragraph 4, and Jim Dandy shall be released from any and all liability from and after said date.

4. When Jim Dandy has deposited in escrow the sum of \$195,000.00, its obligation under this Agreement shall be terminated, and all leases, sub-leases, assignments and bills of sale remaining in the escrow shall be delivered to Jim Dandy.

The escrow instructions shall provide that the Bill of Sale, as well as the leases and assignments thereof as to any particular market, shall be delivered to Jim

Dandy when Jim Dandy has paid the following amounts:

Western Avenue	\$39,975.00	20½ %
Ontario	28,275.00	14½ %
Sixth Street	27,300.00	14 %
Atlantic Blvd.	27,300.00	14 %
Central Avenue	23,400.00	12 %
Watts	19,500.00	10 %
Figueroa Street	14,625.00	7½ %
Norwalk	14,625.00	7½ %

Smith shall have the right to withdraw money from the escrow deposited by Jim Dandy, subject only to any claims that are made against the fund, and provided Smith has deposited in escrow the Bills of Sale, Leases and Assignments.

Jim Dandy shall not have the right to obtain from the escrow, the Bill of Sale pertaining to the office furniture, fixtures and equipment until the entire purchase price is paid.

If claims are presented in the escrow against Smith, Smith shall pay such claims before the close of escrow.

5. As to any leases assigned by Smith to Jim Dandy, Jim Dandy agrees to indemnify and hold Smith harmless from any liability which may or might accrue under said leases subsequent to the assignment.

6. As to the markets owned by Smith, to-wit:

- | | |
|--------------------|------------|
| 1. Central Avenue | 2. Western |
| 3. Figueroa Street | 4. Norwalk |

Smith agrees that Jim Dandy may, without obtaining Smith's permission, sublease any or all of said markets, or assign the leases, and the assignee shall,

in writing, assume and agree to be bound by the terms of the Lease, and a copy of the assignment and assumption shall be delivered to Smith, and Jim Dandy thenceforth shall not be liable under such leases.

In view of the fact that the lease on the said 4 markets is evidenced by one instrument, Smith will, upon the request of Jim Dandy, execute and deliver individual leases upon the several markets sites in order to make convenient the sub-leasing of the market involved, or the assignment of said lease or leases, and said individual leases shall be upon the exact terms and conditions contained in the one instrument, except as to payment of rent for fixtures, machinery and equipment, and the deposit of the \$20,000.00 as security for the performance of the terms, conditions and covenants of the lease, and the giving to Jim Dandy of free rental during the last 11 months on the leases on the Central Avenue, Western and Figueroa Street Stores, and the last 12 months free rental on the Norwalk Market, and except as to any other matter contained therein which is inconsistent with the provisions of this agreement.

7. Jim Dandy will, at its expense, on and after July 1, 1946, keep the fixtures, machinery and equipment fully insured, with loss payable to Smith, until the full purchase price has been paid, and will, during the said period, pay all personal property taxes levied against said fixtures, machinery and office equipment.

8. Smith shall have no concern in connection with the obtaining of a renewal or extension of any of the leases in which he is named as Lessee, and which are being assigned by Smith to Jim Dandy concurrently

herewith; the sole responsibility for taking such action shall be with Jim Dandy.

9. Except as so amended or modified, the prior agreement shall remain in force and effect."

On the 19th of July, 1946, appellant, Central Manufacturers Mutual Insurance Company, hereinafter referred to as "Central Insurance Company," issued its policy No. F-321452 in the sum of \$12,500.00 upon the "ATLANTIC STORE," under which policy Jim Dandy Markets, a partnership, was named as the insured. The policy has a "Loss Payable Clause" dated July 19, 1946.

Thereafter, there was an endorsement placed on the policy which is dated July 19, 1946, which endorsement contained the following:

"Loss Payable Clause #346 in favor of E. F. Smith attached in error, and is hereby deleted from policy.

"Loss, if any, to be adjusted with and payable to the named insured."

On or about the 19th day of July, 1946, appellant, Indiana Lumbermen's Mutual Insurance Company, hereinafter referred to as "Lumbermen's Insurance Company," issued its policy No. 3170 in the sum of \$12,500.00 upon said "ATLANTIC STORE," under which policy Jim Dandy Markets was named as the insured. The policy has a "Loss Payable Clause" dated July 19, 1946.

There was an endorsement on the policy, and said endorsement contained the following:

"Loss Payable Clause #346 in favor of E. F. Smith attached in error, and is hereby deleted.

"Loss, if any, to be adjusted with and payable to the named insured."

Both policies issued by plaintiff appellants permit other insurance.

Concurrently with the execution of the "SUPPLEMENTARY AND MODIFIED AGREEMENT" between Smith and Jim Dandy Markets, Smith and Jim Dandy Markets executed and delivered to the Morrison Escrow Company, Escrow instructions consisting of two pages, and additional Escrow instructions consisting of one page [R. 74 to 84].

Concurrently with the execution and delivery of the "SUPPLEMENTARY AND MODIFIED AGREEMENT," and with the execution and delivery of said "ESCROW INSTRUCTIONS," Smith delivered to the Escrow Holder each and all of the documents required of him to be delivered, and each and all of the following documents relating to the "ATLANTIC STORE":

- (a) Lease dated September 29, 1941 between E. F. Smith and Charles Kindig and Daisy Kindig [R. 56 to 60].
- (b) Lease dated February 1, 1942, between E. F. Smith and Thomas A. McLenaghan [R. 60 to 64].
- (c) Bill of Sale dated June 27, 1946, executed by E. F. Smith [R. 84 to 86].
- (d) Assignment of Lease dated June 27, 1946, executed by E. F. Smith [R. 86 to 88].

The building known as the "ATLANTIC STORE," and described in the policies issued by plaintiffs and appellants, was totally destroyed by fire on January 14, 1947, and at that time all rights of the partnership known as Jim Dandy Markets in and to said store and said building, had been succeeded to by Jim Dandy Markets, Inc., by

virtue of an agreement dated October 5, 1946 (conceded by all parties).

All payments due Smith from Jim Dandy Markets under the "SUPPLEMENTARY AND MODIFIED AGREEMENT," and under the "ESCROW INSTRUCTIONS" up to and including the date of the fire, had been paid and were not in default, and on the 19th of March, 1947, all payments required to be made under said "SUPPLEMENTARY AND MODIFIED AGREEMENT" and said "ESCROW INSTRUCTIONS" as relating to the "ATLANTIC STORE" were paid in full to the appellant Smith, and the Morrison Escrow Company delivered to appellee Jim Dandy Markets, Inc., the following documents:

1. Lease dated February 1, 1942 between McLenaghan and Smith [R. 60 to 64].
2. Lease dated September 29, 1941 between Kindig and Smith [R. 56 to 60].
3. Bill of Sale dated June 27, 1946, executed by E. F. Smith [R. 84 to 86].
4. Assignment of Lease dated June 27, 1946, executed by E. F. Smith [R. 86 to 88].

On July 30, 1947, the full sum of \$225,000.00 required to be paid to Smith under the "SUPPLEMENTARY AND MODIFIED AGREEMENT" and under the "ESCROW INSTRUCTIONS" was paid, and Morrison Escrow Company delivered to appellee, Jim Dandy Markets, Inc., all papers and documents required of said Morrison Escrow Company to be delivered by said "SUPPLEMENTARY AND MODIFIED AGREEMENT" and said "ESCROW INSTRUCTIONS."

The cash sum value of the building destroyed by fire on January 14, 1947, is the sum of \$32,476.92, and Jim

Dandy Markets, Inc., did and performed everything required of it to be done and performed under the policies of plaintiffs herein, and plaintiffs have paid nothing under said policies, although appellee Jim Dandy Markets, Inc., has made demand of plaintiffs for the payment thereof.

The policy issued by appellee Central Insurance Company to appellee Jim Dandy Markets, Inc., contains the following provisions, to-wit:

(a) It is understood and agreed that the property insured hereunder stands on leased ground, lease expiring 6-30-55.

(b) Matters avoiding policy. This policy shall be void (b) if the interest of the insured be other than unconditional and sole ownership.

(c) Apportionment of loss. This Company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property whether valid or not, or by solvent or insolvent insurers.

The policy issued by appellee Lumbermen's Insurance Company to appellee Jim Dandy Markets, Inc., contains the following provisions, to-wit:

(a) It is understood and agreed that the property insured hereunder stands on leased ground, lease expiring June 30, 1955.

(b) Matters avoiding policy. This policy shall be void (b) if the interest of the insured be other than unconditional and sole ownership.

(c) Apportionment of Loss. This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property whether valid or not, or by solvent or insolvent insurers.

The policy issued by Fireman's Fund contains the following provisions:

(a) Matters avoiding policy. This entire policy shall be void (b) if the interest of the insured be other than unconditional and sole ownership.

(b) Matters suspending insurance. Unless otherwise provided by agreement endorsed hereon or added hereto, this company shall not be liable for loss or damage occurring (g) while the interest in, title to, or possession of the subject of insurance is changed excepting:—(2) a change of occupancy of building without material increase of hazard.

(c) Apportionment Clause. This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering said property whether valid or not, or by solvent or insolvent insurers.

(d) Ownership Clause. It is understood and agreed * * * that changes may take place in the interest, title or possession of the subject of insurance whether by legal process or judgment or by voluntary act of the Insured, provided this company consents thereto in writing within sixty (60) days next following date of such change.

ARGUMENT.

POINT I.

The Assignment of Lease Did Convey to Jim Dandy Markets, All Rights That Smith Had in the Leases Assigned, Including the Building.

The assignment delivered in escrow of the "ATLANTIC STORE" is in the usual form used by lawyers assigning leases without reservations. The assignment does not except therefrom the building, and in the absence of such an exception the assignment carries with it all rights that the assignor had, including the right to the building and the right to remove the same. If all that Smith intended to assign was the "bare land," then why did he not impose a condition requiring Jim Dandy to pay rent for the use of the building, particularly in view of the fact that under the option contained in the Leases, Jim Dandy would be entitled to use the building until August 1, 1952. Additionally, we pose the question whether any reasonable man would take an assignment of a lease upon "bare land" when the land without the building was of no value to him.

In *Methodist Episcopal Church v. Seitz*, 74 Cal. 287, 15 Pac. 839, the Court said:

"This is an action to recover \$6,213 upon a contract of sale contained in a lease. The defendant was the owner of a lot of land, and one William Perkins was the owner of certain buildings upon it. This being the situation of the parties, they entered into a contract by which defendant leased the land to Per-

kins at a rental of \$120 per month, and which contained a provision that the buildings should stand as security for the rent, and that at the expiration of the term Perkins should have the option either to remove the buildings, or to require defendant to take them at a valuation 'to be ascertained by two persons, one to be chosen by each party; and in case the persons so chosen disagree, those two shall choose an umpire, whose decision shall be final and binding on the parties hereto and their legal representatives.'

Afterward, Perkins, with the consent of the defendant, executed the following paper: 'For value received, I hereby sell and assign all my right, title and interest in and to the within lease to the California Annual Conference of the Methodist Episcopal Church.'

At the expiration of the term plaintiff and defendant each selected a person to ascertain the value of the buildings; and they (not being able to agree) selected an 'umpire' who decided that the value was \$6,213. Defendant refusing to pay, the plaintiff brought this action for the amount. The court below gave judgment for the plaintiff, and the defendant appeals.

1. The point is made that the assignment was not sufficient to pass the right to the contract of purchase. The argument is, that the right of purchase was a distinct thing from the 'lease'; that the title to the buildings was in Perkins; that he did not lease his own property for himself, but only the land of the defendant; and that the assignment was only of

‘the within lease,’ no words of conveyance of the building being used; that therefore the title is still in Perkins, and the plaintiff has nothing to sell.

This argument is exceedingly plausible, but we do not think it is sound. The parties to the assignment certainly supposed they were transferring the lessee’s right in relation to the buildings; for it does not appear the land had any use as distinct from the buildings. A town lot covered with buildings could not well have such distinct use as long as the buildings remained upon it, which, in this case, was to be until the expiration of the lease. But if the ownership of the buildings remained in the assignor, the right to use them would remain in him also; and upon this theory the assignee contracted for a barren right.” (Italics ours.)

In *Bewick v. Mecham*, 26 Cal. 2d 92, 156 P. 2d 757, Lopez leased real property to Lombard for the operation of a service station. The lease authorized the lessee to make improvements, and gave the lessee the right to buy the property upon certain conditions. Lombard, the lessee, assigned his interest to plaintiff in the “indenture of lease,” to which assignment the lessor consented. When the plaintiff exercised his option to purchase the land at the end of the term, the lessor refused to sell, contending that the assignment of the lease did not carry with it the right to exercise the option to purchase. The Court said:

“Defendant contends that the assignment of the lease by Lombard to plaintiff did not carry with it the option to purchase the land. The assignment named

as its subject matter 'the indenture of lease.' 'The assignment of the writings by which a contract is witnessed is the most common mode of transferring the contract, and cannot be understood as having any other intention.' (Blakeman v. Miller, 136 Cal. 138, 141 (68 P. 587, 89 Am. St. Rep. 120).) Moreover, an option to purchase the land during, or at the end of the term, operates to the benefit of the Lessee as such, for he may erect buildings or other structures without losing their use at the end of the term, and it is therefore settled in this state that 'an option covenant contained in a lease is a real covenant running with the land.' (Chapman v. Great Western Gypsum Co., 216 Cal. 420, 425 (14 P. 2d 758, 85 A. L. R. 917); See Laffan v. Naglee, 9 Cal. 662, 678 (70 Am. Dec. 678); Hall v. Center, 40 Cal. 63; Standard Oil Co. v. Slye, 164 Cal. 435, 442 (129 P. 589); 15 Cal. L. Rev. 56; 2 Tiffany, Landlord and Tenant, par. 267.) The separate reference in the agreement to the lessor's consent to an assignment of the option right prevented the Lessee from claiming that he could assign the option to purchase without the lease. (See Mott v. Cline, 200 Cal. 434, 450 (253 P. 718); 15 Cal. L. Rev. 56.)"

See, also:

Wong v. Stuyvesant Insurance Co., 100 Cal. App. 109, 279 Pac. 1050.

POINT II.

The Assignment Should Not Be Reformed as There Is No Showing of Any Ground for Reformation.

The Civil Code of California provides as follows:

“Section 3399, Civil Code. WHEN CONTRACT MAY BE REVISED. When, *through fraud, or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected*, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

“Section 3400, Civil Code. PRESUMPTION AS TO INTENT OF PARTIES. For the purpose of revising a contract, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement.

“Section 3401, Civil Code. PRINCIPLES OF REVISION. In revising a written instrument, the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.”

The evidence in this case does not show that the assignment sought to be reformed was executed as the result of (a) fraud; (b) mutual mistake of the parties; (c) a mistake of one party which the other at the time knew or suspected.

The “SUPPLEMENTARY AND MODIFIED AGREEMENT” as well as the “ESCROW INSTRUCTIONS” provided for “Assignment of Leases,” and there is nothing in the testimony of appellant Smith, his lawyer, Thomas B. Cassidy, or

his agent, James R. Johnston, from which the Court could find that any fraud was practiced by Jim Dandy Markets upon appellant Smith, or that there was a mutual mistake, or that there was a mistake upon the part of Smith that was known to Jim Dandy. It is undisputed that Jim Dandy, after the execution of the assignment, acted in accordance with the implication of a leasehold assignment, to-wit, insuring the building and paying for the fire insurance policies which are the basis of its claim against its insurance carriers. If Jim Dandy did not conscientiously and honestly believe that the assignment of the lease carried with it Smith's right to the building, it would be unreasonable to assume that Jim Dandy would pay \$550.00 premiums for the policies issued to it, and it would likewise be unreasonable to assume that although the Agreement dated July 1, 1945 [R. 27 to 40] gave Jim Dandy an option to be exercised ten years hence to buy fixtures and equipment described in the Agreement dated July 1, 1945 for the sum of \$192,500.00, Jim Dandy would, on June 12, 1946, enter into an agreement with Smith [R. 65 to 73] under which Jim Dandy agreed to pay Smith \$225,000.00, as provided in said "SUPPLEMENTARY AND MODIFIED AGREEMENT" unless Jim Dandy was getting more from Smith under the "SUPPLEMENTARY AND MODIFIED AGREEMENT" than it was getting under the agreement dated July 1, 1945. It is significant to note that under the agreement dated June 12, 1946 (approximately 11½ months after the July 1, 1945 Contract) Jim Dandy unequivocally agreed to pay Smith \$225,000.00, \$30,000.00 thereof immediately by credit of the \$50,000.00 deposited under the July 1, 1945 Agreement, and \$5,000.00 per month, plus 6% interest, commencing August 1, 1946 on the unpaid balance, the result being that

taking Smith's valuation of money, 6%, under the June 12, 1946 contract, he would receive \$225,000.00 as against \$192,500.00 ten years hence, plus 6% interest which, for approximately a nine-year period, is equivalent in round figures to \$121,500.00 additional.

See opinion of Judge Yankwich in the case at bar, 77 Fed. Supp. 171.

The cases are legion to the effect that a mistake of one party not known or suspected by the other cannot be reformed nor can unilateral mistakes be reformed.

In *Meyerstein v. Burke*, 193 Cal. 105, 222 Pac. 810, plaintiff brought an action against the defendant to obtain a judgment reforming a contract alleged to have been executed through the mistake of the parties. The contract in question is an executory contract for the purchase and sale of a house and lot, it being the theory of the plaintiff that he sold the property to defendant for \$7,000.00, and interest on unpaid installments at 6%, payable \$1,000.00 in cash and the balance at the rate of \$50.00 per month. On the other hand, it was the theory of the defendant that he purchased the house and lot from the plaintiff for both the principal and interest totalling \$7,000.00, payable \$1,000.00 cash and the balance at the rate of \$50.00 per month.

The Court found in favor of the plaintiff, and the Supreme Court held that the contract may not be reformed where there was a mistake by one party that was not known or suspected by the other, and said on page 108:

“Moreover, if the finding of the trial court had been made in the identical language of the complaint, and the finding had been made in favor of the plaintiff, that fact alone would have been of no assistance

to the plaintiff. The trial court found that no mutual mistake was made and that any mistake made by the plaintiff was neither known to, nor suspected by, the defendant. Under these circumstances a failure to find on the issue in question was not a reversible error. (*Gates v. McLean*, 70 Cal. 42, 46 (11 Pac. 489).)”

In *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 808, the Court said on page 541:

“Such a mistake, to justify the modification of a contract, cannot be established by a party who has accepted and acted upon a written contract by a mere showing that he thought the contract expressed something other than that which its plain terms denote. He must show in addition to that the mutuality of the mistake, that the minds of the contracting parties met, that they agreed upon a certain thing which was to have been embodied in their contract, and that by a mistake it was either fraudulently or inadvertently omitted or clumsily and ambiguously expressed. To the necessity of pleading a mistake it is sufficient to refer, from the multitude, to such cases as *Pierson v. McCahill*, 21 Cal. 123; *Murray v. Dake*, 46 Cal. 645; *Harrison v. McCormick*, 89 Cal. 327 (23 Am. St. Rep. 469, 26 Pac. 830); *Bradbury v. Higginson*, 167 Cal. 553 (140 Pac. 254); *Carr v. King*, 24 Cal. App. 714, (142 Pac. 131); 17 Cyc. 703. Respondents’ reliance upon *Hoffman v. Kirby*, 136 Cal. 26 (68 Pac. 321), as a justification for the admission of this parol evidence, is entirely misplaced. In *Hoffman v. Kirby*, there was a formal complaint based upon fraud and deceit under which a reformation of the contract was sought. That such a mistake, to justify relief because of it, must be mutual,

as this manifestly is not, is recognized by all authorities. (Allen v. Hammond, 11 Pet. 63 (9 L. Ed. 633); Thompson v. Jackson, 3 Rand. (Va.) 504 (15 Am. Dec. 721); Carr v. Callaghan, 3 Litt. (Ky.) 365; Glassell v. Thomas, 3 Leigh (Va.) 113; Chamberlaine v. Marsh, 6 Munf. (Va.) 283.)”

See, also:

Miller v. Lantz, 9 Cal. 2d 544, 71 P. 2d 585;

Moore v. Vandermast, 19 Cal. 2d 94, 119 P. 2d 129;

Goodfellow v. Barritt, 130 Cal. App. 548, 20 P. 2d 740;

California Trust Company v. Cohn, 9 Cal. App. 2d 33, 48 P. 2d 744.

Conclusion.

It is therefore respectfully submitted that under the assignment executed by Smith to Jim Dandy, Jim Dandy acquired all rights that Smith theretofore had, including the ownership of the building and the right to remove the same, and that no legal cause was shown by Smith for reformation of the assignment.

Respectfully submitted,

HARRY G. SADICOFF,

Attorney for Appellee, Jim Dandy Markets, Inc.

No. 11982

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC., a Corporation; FIREMAN'S FUND INSURANCE COMPANY, a Corporation; and E. F. SMITH,

Appellees.

Reply Brief of Appellee, Jim Dandy Markets, Inc. to Opening Brief of Appellants, Central Manufacturers' Mutual Insurance Company, and Indiana Lumbermen's Mutual Insurance Company.

FILED

OCT 25 1948

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TOPICAL INDEX

PAGE

A.

Statement of the case.....	1
Argument	2
Point I. Jim Dandy was purchasing the "Atlantic Store," including the building thereon, under a conditional sales contract, and was therefore the sole and unconditional owner of the building at the time it was destroyed by fire.....	2
Point II. A purchaser under a conditional sales contract who has not acquired title has an insurable interest in the property purchased, and the risk of loss is upon the purchaser....	7
Point III. Insurance company presumed to have insured such interest as insured had at the time the policy was issued, in the absence of fraud on the part of the insured....	11
Point IV. Apportionment clause in policies issued by plaintiffs to Jim Dandy is not applicable.....	13
Point V. Contention of appellant insurance companies that Jim Dandy Markets, Inc., is entitled to benefit of insurance collectible by appellee E. F. Smith from Fireman's Fund....	18
Conclusion	19

TABLE OF AUTHORITIES CITED

CASES	PAGE
Beaudry v. Peterson, 50 Cal. App. 2d 478, 123 P. 2d 108.....	8
Brickell v. Atlas Assurance Co., Ltd., 10 Cal. App. 17, 101 Pac. 16	6
Calfee v. Home Insurance Co., 91 F. 2d 553.....	6
Dietzel v. Patrons Mut. Fire Ins. Co., 205 N. W. 149, 232 Mich. 415	17
Dunne v. Phoenix Ins. Co., 113 Cal. App. 256, 298 Pac. 49....	12
Golden Gate Motor Transport Co. v. Great American Indemnity Co., 6 Cal. 2d 439, 58 P. 2d 374.....	12
Home Ins. Co. v. Koob, 58 L. R. A. 58, 113 Ky. 360, 68 S. W. 453	17
Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307, 197 Pac. 99	6
Lee v. U. S. Fire Ins. Co., 55 Cal. App. 391, 203 Pac. 774.....	6
Lubetsky v. Standard Fire Ins. Co., 187 N. W. 260, 217 Mich. 654	17
McCullough v. Home Ins. Co., 155 Cal. 659, 102 Pac. 814.....	3
Mosee v. Fireman's Ins. Co., 87 Cal. App. 473, 262 Pac. 436....	14
Ramirez v. United Firemen's Ins. Co., 46 Cal. App. 451, 189 Pac. 309	6
Raulet v. Northwestern Ins. Co., 157 Cal. 213, 107 Pac. 292....	12
Sam Wong v. Stuyvesant Ins. Co., 100 Cal. App. 109, 279 Pac. 1050	11
Savage v. Norwich Union Fire Ins. Soc., 125 Cal. App. 330, 13 P. 2d 955.....	6
Sharp v. Scottish Union etc. Co., 136 Cal. 542, 69 Pac. 253.....	12
Smith v. American Ins. Co., 143 N. W. 54, 177 Mich. 123.....	17
Traders' Insurance Co. v. Pacaud, 37 N. E. 460, 150 Ill. 245....	17

STATUTES

Civil Code, Sec. 1742.....	7
----------------------------	---

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Reply Brief of Appellee, Jim Dandy Markets, Inc. to Opening Brief of Appellants, Central Manufacturers' Mutual Insurance Company, and Indiana Lumbermen's Mutual Insurance Company.

A.

Statement of the Case.

A statement of the case appears in the Reply Brief of Appellee Jim Dandy Markets, Inc. to Appellant Smith's Opening Brief, and therefore no further statement will be made herein. The attention of the Court is, however, directed to the fact that none of the parties hereto, and particularly none of the Appellants, have contended, or now contend, that there is no liability to Appellee Jim Dandy Markets, Inc. under the policies of fire insurance issued by the Appellants Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company.

Hereafter, Jim Dandy Markets, a partnership, and its successor, Jim Dandy Markets, Inc., will be referred to as "Jim Dandy."

ARGUMENT.

POINT I.

Jim Dandy Was Purchasing the "Atlantic Store," Including the Building Thereon, Under a Conditional Sales Contract, and Was Therefore the Sole and Unconditional Owner of the Building at the Time It was Destroyed by Fire.

Each of plaintiffs' policies issued to Jim Dandy under the paragraph "Matters avoiding policy" provide that the policy shall be void if the interest of the insured be other than unconditional and sole ownership. To one who is unacquainted with the decisions of the Courts of California construing said provision, it would appear that a purchaser under a conditional sales contract who has not yet obtained title is not the sole and unconditional owner, and therefore cannot recover under the policy. Fortunately for Jim Dandy, such is not the law in the State of California.

An examination of the "SUPPLEMENTARY AND MODIFIED AGREEMENT" and of the "ESCROW INSTRUCTIONS" will show, beyond a peradventure of a doubt, that Jim Dandy did not have an "option" to purchase from Smith, but was under a definite and unqualified obligation to pay Smith \$225,000.00 without any alternative, and Smith, in consideration of that agreement, agreed to assign, and did assign, all interest that he had in the Leases, including the Lease covering the "ATLANTIC STORE." Under such circumstances the Courts have held that the Conditional Vendee is the sole and unconditional owner of the prop-

erty, and in the event of the destruction of the building by fire, the vendee can recover on the policy.

In the case of *McCollough v. Home Ins. Co.*, 155 Cal. 659, 661, 102 Pac. 814, the Court said:

“On July 31, 1905, the defendant issued to plaintiff a policy of fire insurance in the sum of three thousand dollars. Of this amount two thousand dollars was on a frame building, and one thousand on household furniture and effects contained therein. The building and contents were destroyed by fire, and this action was brought on the policy. The plaintiff had judgment for \$2,650, with interest and costs, and defendant appeals from the judgment and from an order denying its motion for a new trial. The appellant bases its position upon two clauses of the policy, one relating to the title of the insured, and the other to the furnishing by him of sworn proofs of loss within a certain time.

1. The policy provided that it should ‘be void . . . if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by insured in fee simple.’ The court found, following the allegations of the complaint, that before the policy was issued, the plaintiff fully stated and disclosed to the defendant and its agents, the nature and character of his interest in said land, *i. e.* that he held the land under a contract of purchase, was paying for the same upon installments, and did not yet have a deed, and found, further, that at all times since the issuance of the policy, the plaintiff had been the sole and exclusive owner of the building and the land, ‘except as aforesaid.’ These findings, in so far as they import either a compliance with the terms of the policy

or a waiver of a breach, are attacked as unsupported by the evidence.

The facts shown in connection with plaintiff's interest in the property were these: On April 22, 1904, Golden State Realty Investment Company, a corporation, was the owner of the land, described as Lots 62 and 63 in the Watts Junction tract. On that day it issued to plaintiff two papers, similar in form, referring to Lots 62 and 63 respectively. Each acknowledged the receipt from plaintiff of three dollars, 'as a deposit to secure' the lot described, and went on to state that the deposit was accepted as rent of said property for one week, that plaintiff was to pay the further sum of \$1.50 as weekly rent for 97 weeks, and that upon payment of said sums, and the further sum of \$1.50, the Golden State Company would convey the property, free and clear of encumbrance, to plaintiff. The contracts contained a provision for forfeiture in the event of a default in payment for four weeks. At the date of the issuance of the policy, July 31, 1905, the plaintiff had made fifty-six weekly payments on each of the contracts. Subsequently the remaining payments were made and the property conveyed to plaintiff. The building on the land was erected by plaintiff and was occupied by him.

The papers issued by the Golden State Company bore the designation 'Lease Contract.' Notwithstanding this, and the further fact that the weekly payments were described as 'rent,' there can be no doubt that the instruments were in fact not leases, but contracts of sale. (*Parks etc. Co. v. White River L. Co.*, 101 Cal. 37 (35 Pac. 443); *Parke etc. Co. v. White River L. Co.*, 110 Cal. 658 (43 Pac. 202); *Holt Mfg. Co. v. Ewing*, 109 Cal. 353 (42 Pac. 435).)

The clause of the policy providing that it shall be void if the insured's interest is other than sole and unconditional ownership, or the subject be a building on ground not owned by the insured in fee simple is designed to remove from him the temptation to profit by the willful destruction of property not entirely owned by him. (*Imperial Fire Ins. Co. v. Dunham*, 117 Pa. 460 (2 Am. St. Rep. 686, 12 Atl. 668).) 'It therefore follows that the clause is in most cases held to refer to the character and quality of the title—to the actual and substantial ownership, rather than to the strictly legal title.' (2 Cooley on Insurance, 1369.) An equitable title in the insured is a sufficient compliance with the condition in question. A vendee in possession of property under a valid contract of purchase which he is entitled to enforce specifically, is the holder of such equitable title. (*Id.* 1376.) And the great weight of authority supports the proposition that such vendee is the 'sole and unconditional owner,' within the meaning of the policy, even though a portion of the purchase price may yet remain unpaid. (*Id.* *Pennsylvania F. I. Co. v. Hughes*, 108 Fed. 497 (47 C. C. A. 459); *Phenix Ins. Co. v. Kerr*, 129 Fed. 723 (64 C. C. A. 251); *Loventhal v. Home Ins. Co.*, 112 Ala. 108 (57 Am. St. Rep. 17, 20 South 419); *Dupreau v. Hibernia Ins. Co.*, 76 Mich. 615, 43 N. W. 585; *Pelton v. Westchester F. I. Co.*, 13 Hun. 23, Affirmed 77 N. Y. 605; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. 460 (2 Am. St. Rep. 686, 12 Atl. 668); *Franklin F. I. Co. v. Crockett*, 7 Lea, 725; *Johannes v. Standard Fire Office*, 70 Wis. 196 (5 Am. St. Rep. 159, 35 N. W. 298).) This doctrine would not apply to the case of one in possession of land under a mere option, which does not bind him to make the payments or to complete the purchase. (*Phenix Ins. Co. v. Kerr*,

129 Fed. 723 (64 C. C. A. 251).) Here, however, while the instruments executed by the Golden State Company were not signed by the plaintiff, they referred to and incorporated a prior application signed by him, and we think the contract and application, read together, did amount to an agreement, on McCullough's part, to purchase and pay for the property.

Under the facts shown there was, therefore, no breach of the condition of ownership, and there is no occasion to consider whether the evidence supports the finding of a waiver of the supposed breach."

In *Lee v. U. S. Fire Ins. Co.*, 55 Cal. App. 391, 394, 203 Pac. 774, the Court said:

"The clause of the policy providing that it shall be void if the insured's interest is other than sole and unconditional ownership . . . is designed to remove from him the temptation to profit by the wilful destruction of property not entirely owned by him . . . 'It therefore follows that the clause is in most cases held to refer to the character and quality of the title to the actual and substantial ownership, rather than to the strictly legal title' . . . An equitable title in the insured is a sufficient compliance with the condition in question."

See also:

Savage v. Norwich Union Fire Ins. Soc., 125 Cal. App. 330, 336, 13 P. 2d 955;

Brickell v. Atlas Assurance Co. Ltd., 10 Cal. App. 17, 101 Pac. 16;

Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307, 308, 197 Pac. 99;

Calfee v. Home Insurance Co., 91 Fed. Rep. 2d 553;

Ramirez v. United Firemen's Ins. Co., 46 Cal. App. 451, 189 Pac. 309.

POINT II.

A Purchaser Under a Conditional Sales Contract Who Has Not Acquired Title Has an Insurable Interest in the Property Purchased, and the Risk of Loss Is Upon the Purchaser.

It is unquestionably the law in California that a purchaser, under a conditional sales contract, whether the property purchased is real or personal property, has an insurable interest in the property purchased, and the risk of loss is upon the purchaser. Appellee Jim Dandy admits, in fact it has never contended otherwise, that the building destroyed by fire was personal property, and that said building could not be considered real property unless the owner of the building, at the expiration of the Lease, failed, neglected, or refused to exercise the right to remove the building.

In 1931 the "Uniform Sales Act" was enacted in California, and under Section 1742 of the Civil Code, the risk of loss of the goods sold, even though title had not passed to the Vendee, is upon the Vendee. Said section reads as follows:

"RISK OF LOSS. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that:

(a) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

(b) Where delivery has been delayed through the fault of either the buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault."

In *Beaudry v. Peterson*, 50 Cal. App. 2d 478, 480, 123 P. 2d 108, an action was brought to recover the sum of \$4,000.00 balance due on the purchase price of some machinery sold by the plaintiff to the defendant under a conditional sales contract. The property sold was, prior to the payment of the full purchase price, and prior to the passage of title, totally destroyed by fire. An action having been brought for the purchase price, the vendee contended that he was not liable because title had not passed to him and the property had been destroyed by fire. The Court said:

"It is clear to us that the judgment is fully supported by the findings. The agreement was a conditional sales contract and the title was reserved in the plaintiff even though the contract does not so provide expressly. (*Katz v. People's Finance, etc. Co.*, 101 Cal. App. 552 (281 Pac. 1097); *Bailly v. Loock*, 103 Cal. App. 220 (284 Pac. 235).) In the event of default the seller had the option to repossess the property or to sue for the purchase price. (*Johnson v. Kaeser*, 196 Cal. 686 (239 Pac. 324); *Smith v. Miller*, 5 Cal. App. (2d) 564 (43 Pac. (2d) 347).) (2) His right to bring such an action was not defeated by the destruction of the property, for it is now the law in this state, as it has been for years in the great majority of other jurisdictions (24 R. C. L. 494; 2a Uniform Laws Annotated, 196), that one who contracts to buy personal property by an agree-

ment of this nature and takes possession of it assumes the risk of loss. This is provided unequivocally in Section 1742 of the Civil Code (copied above).

Up to the time of the adoption of the Uniform Sales Act by the California Legislature in 1931 (Stats. 1931, p. 2234; Civ. Code., Sec. 1721 ff), it was the law of this state that the risk of loss followed the title to goods even though possession had been transferred under a conditional sales contract. (*Kirtley v. Perham*, 176 Cal. 333 (168 Pac. 351); *Potts Drug Co. v. Benedict*, 156 Cal. 322, 334 (104 Pac. 432, 25 L. R. A. (N. S.) 609); *Ross v. McDougal*, 12 Cal. App. (2d) 172 (55 Pac. (2d) 574); *Cocores v. Assimopoulos*, 4 Cal. (2d) 82 (47 Pac. (2d) 699).) Holding that this was the established rule in California, the Court said in *Kirtley v. Perham*, *supra*:

‘It is a well-settled proposition that an agreement of sale may transfer the right of possession to the vendee without transferring to him the title. Such was the effect of this agreement. The case, therefore, comes within the rule stated in *Potts v. Benedict*, 156 Cal. 334 (25 L. R. A. (N. S.) 609, 104 Pac. 432), that upon an executory agreement of sale, where title is retained in the vendor, although possession is given to the buyer, the loss entailed by the destruction or extinction of the subject matter, without fault by either party, falls upon the vendor, and that he cannot recover any balance of the purchase price remaining unpaid, and is liable to the buyer for the repayment of the portions of the price previously paid.’

It is obvious that the enactment of Section 1742 of the Civil Code made this rule entirely obsolete and

transferred the liability for loss from the seller to the purchaser under a conditional sales contract. In *Kelly v. Smith*, 218 Cal. 543 (24 Pac. (2d) 471), it is said that the case of *Kirtley v. Perham*, *supra*, 'is no longer of any authority for the reason that the rule was changed by legislative enactment in 1931 . . . It will be observed that this legislative enactment is in keeping with the extensive use of the so-called conditional sales contract and the great expansion of credit which has accompanied it. The same reasons which prompt the application of the majority rule respecting risk of loss in California to personal property ought to be given consideration when considering the loss of improvements to real property. Besides bearing in mind the great development of trade through the medium of such contracts with reservations of title as security we ought to consider upon whose shoulders devolves the responsibility of so caring for the property that fire will not occur, and how improper care will contribute to the hazard thereof.'

The risk of loss should be borne by the purchaser because he is the one who has the use of the property and is in a better position to protect it. The record discloses that the defendant purchaser caused the quartz mill, including property described in the contract, to be insured and that he filed a proof of loss after the fire in which he made a claim for damages to at least a portion of the property. The record does not show how much, if anything, he collected from the insurer as compensation. This is immaterial in our view of the case, but these facts indicate that he recognized the legal obligation imposed by the contract to protect himself against loss."

POINT III.

Insurance Company Presumed to Have Insured Such Interest as Insured Had at the Time the Policy Was Issued, in the Absence of Fraud on the Part of the Insured.

It is not contended by either Central Manufacturers' Mutual Insurance Company or Indiana Lumbermen's Mutual Insurance Company (Jim Dandy's insurance carriers), that Jim Dandy did not have an insurable interest in the building at the time the policies were issued to Jim Dandy, nor is there any pleading, evidence or contention that Jim Dandy misrepresented to its insurance carriers the nature or extent of its interest in the property insured. Under such circumstances, it is the law in California that it is presumed an insurance company insured such interest as the insured had in the property insured.

In *Sam Wong v. Stuyvesant Ins. Co.*, 100 Cal. App. 109, 112, 279 Pac. 1050, the Court said:

"Moreover defendant is in no position to set up as a defense lack of ownership or that the insured did not own the ground on which the building was situate, as it waived objection to the form of the policy and is estopped from denying liability thereunder by issuing the policy and accepting the premiums therefor without any written application having been made by the insured, and also without any discussion having been had relative to either title to the buildings or the title to the property on which the same was situate. Plaintiff herein, as owner, had an insurable in-

terest in the building, he being in possession and operating the same as a dryer. (14 Cal. Jur. p. 465; 14 R. C. L. 915.) Prior to the adoption of the standard form of policy in this state it was held that where the assured had an insurable interest in property, and without fraud, in good faith applied for insurance upon the same, and made no actual misrepresentation or concealment of his interest therein, and the insurance company made no inquiry concerning his interest, and issued a policy to him, and accepted and retained the premium, the company must have been presumed to have knowledge of the condition of the title, and to have assured the property with such knowledge. (*Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 213-228 (107 Pac. 292); 14 R. C. L., pp. 926-932.) After the adoption of the standard form of policy, the law of waiver and estoppel remained the same as before upon this subject. (*Kavanaugh v. Franklin Fire Ins. Co.*, 185 Cal. 307, 315 (197 Pac. 99); 14 R. C. L., p. 932.)

It follows that the court below rightfully determined that defendant had waived the provisions in question contained in the policy."

See also:

Raulet v. Northwestern Ins. Co., 157 Cal. 213, 107 Pac. 292;

Sharp v. Scottish Union etc. Co., 136 Cal. 542, 69 Pac. 253;

Golden Gate Motor Transport Co. v. Great American Indemnity Co., 6 Cal. 2d 439, 58 P. 2d 374;

Dunne v. Phoenix Ins. Co., 113 Cal. App. 256, 298 Pac. 49.

POINT IV.

Apportionment Clause in Policies Issued by Plaintiffs to Jim Dandy Is Not Applicable.

Each policy issued by plaintiffs (Jim Dandy's insurers) expressly permits other insurance, and each policy contains an apportionment clause reading as follows:

“APPORTIONMENT CLAUSE: This company shall not be liable for a greater proportion of any loss from any peril or perils included in this endorsement than (1) the amount of insurance under this policy bears to the whole amount of fire insurance covering the property, whether valid or not and whether collectible or not, and whether or not such other fire insurance covers against the additional peril or perils insured hereunder; (2) nor for a greater proportion than the amount of insurance under this policy bears to the amount of all insurance, whether valid or not and whether collectible or not, covering in any manner such loss; furthermore, if there be insurance other than fire insurance covering any one or more of the perils causing loss hereunder, covering specifically any individual unit of property involved in the loss, only such proportion of the insurance under this policy shall apply to such unit specifically insured, as the value of such unit shall bear to the total value of all the property covered under this policy, whether such other insurance contains a similar clause or not.”

The plaintiffs, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company, contend that their liability should be apportioned with the Fireman's Fund policy issued to E. F. Smith. There is no basis in logic or in law for such contention. The apportionment clause above quoted is only

applicable to insurance upon "the same interest" and is only applicable if Jim Dandy is insured by two or more companies, and is not applicable if a stranger to Jim Dandy's interest takes out insurance upon the same building, without its knowledge or consent.

The mere statement of the proposition shows the fallacy of the contention of the plaintiff insurance companies, because such a contention, if followed to its natural conclusion, would require an apportionment, if the writer of this brief insured his home for \$50,000.00, and the Clerk of this Court likewise obtained \$50,000.00 worth of insurance upon my home, then even though the Clerk of this Court could not recover on his policies and they are void, and I actually sustained a \$50,000.00 loss, I could only recover \$25,000.00.

It is settled law in this state that the apportionment clause is not applicable to the case at bar.

In *Mosee v. Fireman's Ins. Co.*, 87 Cal. App. 473, 262 Pac. 436, the Court said:

"The appeal involves the question whether the defendant is liable for the full amount of a loss or for the proportion thereof which the amount of its policy bears to the total amount of insurance on the property insured.

The facts are as follows: On November 7, 1912, the plaintiff executed to Charles Mettler, a promissory note for \$1,225, payable three years after date, and to secure the payment thereof executed to Los Angeles Title and Trust Co. a deed of trust to certain real property upon which a dwellinghouse was situated. The trust deed authorized the trustee and the beneficiary thereunder to maintain insurance upon the dwelling house to the satisfaction of either of

them at the expense of the plaintiff. At the time the trust deed was executed, a policy of insurance upon the dwelling was issued to the plaintiff by defendant, insuring him against loss or damage by fire, the loss, if any, being made payable to Mettler, who then selected the defendant as a company satisfactory to him. On February 20, 1913, this policy expired and the defendant, at the request of the plaintiff, issued and delivered to him the policy involved in this action, which was for \$1,300.00 and covered the same property. The latter policy insured the interest of the plaintiff, the loss or damage, according to a mortgagee clause or rider attached, being made payable to Mettler, who, however, refused to accept the policy as being satisfactory. On February 21, 1913, Mettler, without the knowledge or consent of the plaintiff, procured from the Queen Insurance Company a policy upon the same property for \$1,250.00, which also insured the plaintiff, the loss or damage being payable to Mettler. The plaintiff in turn refused to accept the policy issued by the Queen Insurance Company or to pay the premium thereon, of which facts the latter company was notified; whereupon it requested Mettler to retain the policy, and agreed to recognize liability to him alone to the extent of his interest in the property insured. The plaintiff and Mettler each retained the policy procured by him, and on October 20, 1913, a fire occurred which damaged the property to the extent of \$825.00.

In the body of the policy issued by the defendant appears the following clause: "This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expenses of removal from the premises endangered by fire than the amount hereby insured bears to

the entire insurance covering such property whether valid or not or by solvent or insolvent insurers,' and the mortgage clause or rider attached provided as follows: 'In case of any other insurance upon the within described property this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having insurable interest therein whether as owner, mortgagee or otherwise.'

It is contended by defendant that the clauses quoted limited its liability to a proportionate part of the loss, namely, \$420.55; and that the conclusion of the trial court that plaintiff was entitled under the policy to a judgment for the full amount of the loss was erroneous.

(1) According to the agreement between Queen Insurance Co. and Mettler, the insurance issued to the latter was limited to his interest in the property; and it being the rule that the interest created by a mortgage or deed of trust in the nature of a mortgage is an insurable interest distinct from that of the mortgagor or grantor (Civ. Code, Sec. 2546; 26 Cor. Jur., Fire Insurance, Sec. 11, pp. 29, 30; Davis v. Phoenix Ins. Co., 111 Cal. 409 (43 Pac. 1115); Loring v. Dutchess Ins. Co., 1 Cal. App. 186, 188 (81 Pac. 1025)), as is held in the following cases, separate insurance procured thereon is not other insurance requiring an apportionment of the loss upon

a claim by the owner on a policy insuring his interest, as the clause first quoted above has no application to insurance obtained upon another distinct insurable interest in the property; *Commercial etc. Assur. Co. v. Scammon*, 144 Ill. 506 (32 N. E. 916); *Traders Ins. Co. v. Pacaud*, 150 Ill. 245 (41 Am. St. Rep. 355, 37 N. E. 460); *Home Ins. Co. v. Koob*, 113 Ky. 360 (101 Am. St. Rep. 354, 58 L. R. A. 58, 68 S. W. 453); *Hardy v. Lancashire Ins. Co.*, 166 Mass. 210 (55 Am. St. Rep. 395, 33 L. R. A. 241, 44 N. E. 209); *Tuck v. Hartford Fire Ins. Co.*, 56 N. H. 326; *Eddy v. London Assur. Corp.*, 143 N. Y. 311 (25 L. R. A. 686, 38 N. E. 307); *Smith v. American Ins. Co.*, 177 Mich. 123 (143 N. W. 54); *Dietzel v. Patrons Mutual etc. Co.*, 232 Mich. 415 (205 N. W. 149)."

See also:

Home Ins. Co. v. Koob, 58 L. R. A. 58, 113 Ky. 360, 68 S. W. 453;

Traders' Insurance Co. v. Pacaud, 37 N. E. 460, 150 Ill. 245;

Lubetsky v. Standard Fire Ins. Co., 187 N. W. 260, 217 Mich. 654;

Smith v. American Ins. Co., 143 N. W. 54, 177 Mich. 123;

Dietzel v. Patrons Mut. Fire Ins. Co., 205 N. W. 149, 232 Mich. 415.

POINT V.

Contention of Appellant Insurance Companies That Jim Dandy Markets, Inc. Is Entitled to Benefit of Insurance Collectible by Appellee E. F. Smith From Fireman's Fund.

Under Points No. II and III commencing on page 15 of the brief of appellant insurance companies, it is contended that Jim Dandy is entitled to the benefit of any insurance collectible by Smith from the Fireman's Fund Insurance Co., and that therefore there should be apportionment, not by virtue of the contract, but upon some other theory not readily understandable to the undersigned.

On page 17 of Appellants' Brief, appellants state that they "do not contend that the loss should be apportioned by virtue of the pro rata clauses of the respective policies."

At the time of the trial of this case the writer was not unmindful of the cases cited by appellants under said Points II and III. I did not urge that Jim Dandy was entitled to the proceeds of any monies collected by Smith from Fireman's Fund because I did not feel, and do not now feel, that the loss is apportionable between the plaintiff insurance companies on the one hand, and the Fireman's Fund on the other. Additionally, I was convinced that there was no liability on the part of the Fireman's Fund to Smith for the following reasons:

(a) Smith sustained no loss by virtue of the destruction of the building by fire.

(b) Smith's policy was void, because the interest of Smith as of the date of the destruction of the building by fire was other than unconditional and sole ownership.

(c) The policy issued by Fireman's Fund to Smith was suspended and therefore the Fireman's Fund was not liable because the interest in, and title to, the insured property was changed, particularly in view of the fact that Fireman's Fund did not give its consent in writing within sixty days next following the date of such change of interest or title.

Neither my clients nor I would be averse to a holding by this Court that there was liability, not only upon the policies issued by the plaintiffs, but likewise by the Fireman's Fund Insurance Co., and that the loss should be apportioned and all paid to Jim Dandy Markets, Inc., because Jim Dandy would benefit by such a holding. It is admitted that the cash value of the building destroyed by fire is the sum of \$32,476.92, and Jim Dandy could then recover that amount instead of \$25,000.00, but the undersigned, notwithstanding the fact that Jim Dandy would be the beneficiary of such a ruling, has not urged the proposition because I am not convinced that the proposition has merit, and I feel that I would be violating my duty as an officer of this Court if I urged a point that I believed had no merit.

Conclusion.

It is therefore respectfully submitted that Jim Dandy Markets, Inc., at the time of the destruction of the building by fire, was the sole and unconditional owner of the building, and that the judgment herein should be affirmed.

Respectfully submitted,

HARRY G. SADICOFF,

Attorney for Appellee, Jim Dandy Markets, Inc.

No. 11982.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY, and E. F. SMITH,

Appellants,

vs.

JIM DANDY MARKETS, INC., a Corporation; and FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Appellees.

BRIEF OF APPELLEE, FIREMAN'S FUND INSURANCE COMPANY.

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FILED

OCT 28 1948

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TOPICAL INDEX

	PAGE
Statement of the case.....	1
The issues	4
Argument	7
Appellee, Fireman's Fund Insurance Company, was not liable to any of the parties.....	10

TABLE OF AUTHORITIES CITED

CASES	PAGE
Beckwick v. Mecham, 26 Cal. 2d 92, 156 P. 2d 757.....	11
Brickell v. Atlas Assur. Co. Ltd., 10 Cal. App. 17, 101 Pac. 16..	12
Chapman v. Great Western Gypsum Co., 216 Cal. 420, 14 P. 2d 758	11
Fidelity & Cas. Co. etc. v. Fireman's Fund Indemnity Co., 38 Cal. App. 2d 1, 100 P. 2d 364.....	8
Fireman's Fund Ins. Co. v. Palatine Ins. Co., 150 Cal. 252, 88 Pac. 908	8
Gawecki v. General Ins. Co., 167 F. 2d 894.....	12
Hager v. Hanover F. Ins. Co., 64 Fed. Supp. 949.....	8
Kavanaugh v. The Franklin F. Ins. Co., 185 Cal. 307, 197 Pac. 99	12
McCollough v. Home Ins. Co., 155 Cal. 659, 102 Pac. 815.....	12
Methodist Episcopal Church v. Seitz, 74 Cal. 287, 15 Pac. 839	10
Newark F. Ins. Co. v. Turk, 6 F. 2d 533.....	8
Sharman v. Continental Ins. Co., 167 Cal. 117, 138 Pac. 708.....	12
Wootton Hotel Corp. v. Northern Assur. Co. Ltd., 155 F. 2d 988	12

STATUTES

15 California Jurisprudence, p. 752.....	10
Civil Code, Sec. 1742.....	12

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vs.

JIM DANDY MARKETS, INC., a Corporation; and FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Appellees.

BRIEF OF APPELLEE, FIREMAN'S FUND INSURANCE COMPANY.

Statement of the Case.

On and prior to July 5, 1945, appellant, E. F. Smith, was the owner of a certain store building located at 6801 Atlantic Boulevard, Bell, California. This building was located on two parcels of land leased by Smith under separate leases, one parcel from Thomas A. McClenahan, administrator, and one from Charles Kindig and wife. Each of the leases contained substantially the same clause, as follows:

"It is understood that the improvements now on the premises are the property of the lessee, and it is agreed by the lessor that these and all other improve-

ments placed on said property during the term of this lease by lessee shall belong to the lessee and may be removed by him at the expiration of said term.”

On July 5, 1945, appellee, Fireman’s Fund Insurance Company, executed and delivered to appellant, E. F. Smith, its policy of insurance in the standard form provided by the California Statutes, insuring him against loss by fire to his interest in the above-referred-to building (among other buildings) to an amount not exceeding \$16,700. Among the standard provisions contained in the aforesaid policy was the following:

“Unless otherwise provided by agreement endorsed hereon or added hereto this entire policy shall be void, * * * if the interest of the insured be other than unconditional and sole ownership.”

And also provided:

“Unless otherwise provided by agreement endorsed hereon or added hereto this company shall not be liable for loss or damage occurring * * * while the interest in, title to or possession of the subject of insurance is changed, excepting:—by the death of the insured; a change of occupancy of the building without material increase of hazard; and transfer by one or more several co-partners or co-owners to the others.”

On July 1, 1945, appellant E. F. Smith entered into an agreement to sublease and did sublease the aforesaid premises to Jim Dandy Markets, who entered into possession under said sublease. This sublease was part of transaction involving a sale (Smith to Jim Dandy) of a market business conducted in numerous locations and involving other buildings and property. [Deft. Smith’s Ex. A, Tr. 266, 195; 258, 27.]

On June 12, 1946, appellant E. F. Smith entered into a supplemental and modified agreement with Jim Dandy Markets by the terms of which he agreed to sell, and Jim Dandy agreed to purchase for a stipulated consideration certain of the properties referred to in the first agreement, and as part thereof agreed to deliver and did deliver in escrow the original leases above referred to, together with a written assignment of each lease, which agreement further provided that if consent to said assignment was necessary and could not be obtained from lessors that the original subleases were to continue in effect. [Finding X, Tr. 116, fol. 103.] (Appellee Jim Dandy Markets, Inc. is the successor in interest of the co-partnership known as Jim Dandy Markets.)

Following this transaction, and on or about July 19, 1946, Jim Dandy Markets applied to and procured from appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company, California Standard fire insurance policies, by the terms of which said appellants insured Jim Dandy Markets against loss by fire from the 19th day of July, 1946, to the 19th day of July, 1949, each to an amount not exceeding \$12,500, on the aforesaid building located at 6801 Atlantic Boulevard, Bell, California.

On the 14th day of January, 1947, the aforesaid building was destroyed by fire.

At the time of said fire, Jim Dandy had paid all sums due under said agreement, and on March 19, 1947, paid to Smith the full consideration for the Atlantic Boulevard store. [Finding XI, Tr. 118, fol. 105.]

The Issues.

Appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company, commenced action for declaratory relief against appellant, E. F. Smith, and appellee, Jim Dandy Markets, Inc., and appellee, Fireman's Fund Insurance Company. In said Complaint, after alleging the execution of the aforementioned policies of insurance, the plaintiffs pleaded the following provision from the California Standard fire insurance policy:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property whether valid or not, or by solvent or insolvent insurers."

These plaintiffs also alleged the loss by fire of January 14, 1947, and prayed for a declaration of the rights and duties and liabilities of plaintiffs and defendant Fireman's Fund Insurance Company under their respective policies of insurance, and that the Court declare the insurable interests of defendant Jim Dandy and defendant E. F. Smith, and declare whether the policy of defendant Fireman's Fund Insurance Company covered the premises described in said Complaint in such a manner that the apportionment of loss clause above-quoted in plaintiff's policy would apply and be effective. [Tr. 9, fol. 7.]

It was alleged and admitted that plaintiffs were respectively citizens and residents of the State of Ohio and the State of Indiana, and that all three defendants were citizens and residents of the State of California.

To this Complaint appellee Fireman's Fund Insurance Company answered, denying that its policy was in force at the time of the fire and affirmatively pleading that plaintiffs' Complaint failed to state a claim against it upon which the relief prayed for, or any relief, could be granted against it, and also alleged that there was no justiciable controversy between the plaintiffs and defendant, and that the only controversy to which this appellee could be a party would be one between itself and Smith, both citizens and residents of the State of California over which the Court would have no jurisdiction. [Tr. 11, fol. 9.]

Both appellant, Smith, and appellee, Jim Dandy Markets, Inc., likewise answered the Complaint of the plaintiffs, and defendant E. F. Smith filed a separate cross-claim against defendant Jim Dandy Markets, praying for reformation of the aforesaid agreement of June 12, 1946, and for declaration by way of reformation that the said agreement and aforesaid assignment of lease did not convey, or contract to convey, to Jim Dandy Markets the aforesaid building. Jim Dandy Markets, Inc., answered this cross-claim of defendant E. F. Smith, praying for dismissal of said cross-claim; and appellee, Jim Dandy Markets, Inc., likewise filed a cross-claim against defend-

ant, E. F. Smith, denying the right of E. F. Smith to reformation of the aforesaid agreement and assignment, and praying that the rights of Jim Dandy Markets, Inc., and E. F. Smith of the proceeds of any amount recovered against Fireman's Fund Insurance Company be fixed, determined, and adjudicated.

Appellee, Fireman's Fund Insurance Company, was not made a party to either of these cross-claims or to any other claim than the one alleged in the Complaint of plaintiffs, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company.

The District Court found that in accordance with the written contracts appellee, Jim Dandy Markets, Inc., was the sole and unconditional owner of the building at the time of the fire within the meaning of the conditions of the policies of plaintiffs, and that plaintiffs' liability was not diminished by reason of the existence of the policy previously executed and delivered by appellee, Fireman's Fund Insurance Company, to E. F. Smith, and that the action against the defendant and appellee, Fireman's Fund Insurance Company, be dismissed.

ARGUMENT.

While appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company, have apparently, by their Brief, wholly abandoned the case upon which they invoked the jurisdiction of the District Court (said Appellants' Brief, p. 17), and have sought a "new hold," and appellant, E. F. Smith, has never stated any claim against appellee, Fireman's Fund Insurance Company, either by pleading or statement, all of said appellants have appealed from the Judgment dismissing the Complaint as against the appellee, Fireman's Fund Insurance Company, and have served upon this appellee copies of their Brief in this Court, and it therefore becomes necessary for this appellee to answer the same.

As above stated, the policies issued by the aforesaid appellants insured Jim Dandy Markets against loss by fire of their interest in the subject building from July 19, 1946, whereas the policy of appellee, Fireman's Fund Insurance Company, insured appellant, E. F. Smith, against loss by fire to his interest in said building. The policies were separate contracts on separate interests between separate parties, and it is well settled that such contracts do not operate to affect the indemnity of each other, and that the existence of the policy of appellee, Fireman's Fund, had no effect upon the indemnity due Jim Dandy Markets, Inc., from its insurers.

“It is well settled that there is no right of contribution among insurers whose policies contain such a clause. Each of the contracts of insurance is entirely separate and independent of all the others. Each insurer is liable directly to the insured for its proportion of the loss, and the insured can recover from any insurer only such proportion of the loss as it is liable for under the terms of its policy. The payment by one of such insurers of a larger amount than it is bound to pay in no way affects the liability of the other insurers for their proportion of the loss, and gives the party so paying no right to recover the excess so paid from the other insurers. (See 4 Cooley’s Briefs on Law of Insurance, secs. 3099, 3108, 3862; *Hanover Fire Ins. Co. v. Brown*, 77 Md. 64 [39 Am. St. Rep. 386, 25 Atl. 989, 27 Atl. 314]; *Good v. Buckeye, etc. Co.*, 43 Ohio St. 394 [2 N. E. 420].)”

Fireman’s Fund et al. v. Palatine Ins. Co., et al.,
150 Cal. 252, at p. 256, 88 Pac. 907.

See, also:

Fid. & Cas. Co. of N. Y. v. Fireman’s Fund Indem. Co., 38 Cal. App. 2d 1, at p. 4, 100 P. 2d 364;

Hager v. Hanover F. Inc. Co., 64 Fed. Supp. 949
at p. 952;

Newark F. Ins. Co. v. Turk, 6 F. 2d 533.

The authorities to the foregoing rule of law are legion, but in view of the remarkable position taken by appellants, Central Manufacturers’ Mutual Insurance Company

and Indiana Lumbermen's Mutual Insurance Company, in their Brief, we deem it unnecessary to cite further authorities. On page 17 of said appellants' Brief they say:

“With reference to the decision of the Honorable District Court that the loss by reason of the destruction of said building by fire is not apportionable between the plaintiffs and the defendant Fireman's Fund Insurance Company [R. p. 130], counsel for appellants Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company do not contend that the loss should be apportioned by virtue of the pro rata clauses of the respective policies.”

Yet, notwithstanding this bald admission, the said appellants assign as one of their Specifications of Error that the Trial Court erred in adjudging that the loss to defendant, Jim Dandy Markets, Inc., was not apportionable between said appellants and appellee, Fireman's Fund Insurance Company.

Since the only issue made by any of the parties to this action against appellee, Fireman's Fund Insurance Company, was the issue raised by the Complaint of appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Insurance Company, and this appellee's Answer thereto on the question of apportionment, this appellee should probably conclude its Brief here. However, appellants have so persistently attempted to mend their hold that as a matter of precaution this appellee will proceed further in outlining its position.

**Appellee Fireman's Fund Insurance Company Was
Not Liable to Any of the Parties.**

E. F. Smith was the owner of the building in question on July 5, 1945, on which date appellee Fireman's Fund Insurance Company's policy was executed and delivered, and continued to be such owner up to June 27, 1946. [Findings of Fact XVI, Tr. 122, fol. 108.]

On June 12, 1946, appellant E. F. Smith entered into an agreement whereby he agreed to sell and assign to the predecessor of appellee, Jim Dandy Markets, Inc., the lease to the property upon which the said building was erected, and, on June 27, 1946, delivered in escrow the said leases and assignment thereto.

The agreement was meticulous in pointing out that the intent was to assign the leases which had previously been the subject of subleases. [Tr. 67, fol. 61; 69, fol. 63; 71, fol. 64.]

The Court so found. [Findings XVI and XVII, Tr. 122, fol. 108.]

That the assignment of the leases carried with it the interest of the assignor in the building is without question, and, indeed, appellants make no substantial argument against this proposition.

See:

15 Cal. Jur. 752;

Methodist Episcopal Church v. Seitz, 74 Cal. 287,
15 Pac. 839;

Beckwick v. Mecham, 26 Cal. 2d 92, 156 P. 2d 757;

Chapman v. Great Western Gypsum Co., 216 Cal. 420, 14 P. 2d 758.

The Trial Court likewise found that the written agreements, consisting of the contract and the assignments of the lease, constituted the entire agreements between the parties thereto, that is, Smith and Jim Dandy Markets, and that the agreements correctly expressed the intention of the parties thereto, and that there was no mistake, either mutual or otherwise, in the drafting of said agreements. [Tr. 123, fols. 108, 109.]

Inasmuch as appellee, Jim Dandy Markets, Inc., has gone into this phase thoroughly in its Brief, we will not burden this discussion further, other than to state, as the Trial Court found, that there was not an iota of testimony to show that the written instruments did not correctly evidence the agreement and intention of the parties. [See Trial Court's Decision, Tr. 103-105, fols. 90-93.]

At the time the building was destroyed by fire on January 14, 1947, appellee, Jim Dandy Markets, Inc., and its predecessors had paid to appellant Smith all payments required to be made under the provisions of their agreement and under the escrow instructions, and were in possession of the building, and shortly after the fire, in March, 1947, paid to the said E. F. Smith in full all sums due or to become due on account of the contract to purchase said building. [Findings XI, Tr. 118-119, fol. 105.]

Within the meaning of the sole and unconditional ownership clause in the policies Jim Dandy Markets, Inc., were at the time of the fire the sole and unconditional owners of this building, and, conversely, appellant E. F. Smith was not the sole and unconditional owner.

Kavanaugh v. The Franklin F. Ins. Co., 185 Cal. 307, 197 Pac. 99;

McCullough v. Home Ins. Co. of N. Y., 155 Cal. 659, 102 Pac. 815.

Although appellant E. F. Smith was the sole and unconditional owner of the property involved at the time the policy of appellee, Fireman's Fund Insurance Company, was executed and delivered, he, by his voluntary act, subsequent to the issuance of the policy and prior to the fire, changed that interest by contract with Jim Dandy Markets, and, consequently, at the time of the fire said policy was suspended and there was no liability to Smith.

Sharman v. Continental Ins. Co., 167 Cal. 117, 138 Pac. 708;

Brickell v. Atlas Assur. Co., Ltd., 10 Cal. App. 17, 101 Pac. 16;

Wootton Hotel Corp. v. Northern Assur. Co., Ltd., 155 F. 2d 988;

Gawrecki v. General Ins. Co., 167 F. 2d 894 (9th Cir.).

Appellant E. F. Smith suffered no loss by reason of this fire since the entire loss fell upon the vendee (Cal. Civil Code, Sec. 1742), and since the vendee had com-

plied with all the conditions of its agreement, and subsequent to the fire had paid the vendor the full consideration agreed to be paid.

Consequently, since the contract is a personal contract and no privity exists between appellee and appellants, insurance companies, and this appellee has denied liability to E. F. Smith, there is no necessity for discussing what application as between the vendor and the vendee would be made of any monies that might have been collected by appellant, E. F. Smith, from this appellee.

Appellee, Fireman's Fund Insurance Company, respectfully submits that the District Court did not err in dismissing it from this action.

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W. W. HINDMAN,

*Attorneys for Appellee, Fireman's Fund Insurance
Company.*

No. 11982.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. F. SMITH,

Appellant,

vs.

JIM DANDY MARKETS, INC., FIREMAN'S FUND INSURANCE COMPANY, CENTRAL MANUFACTURER'S MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellees,

and

CENTRAL MANUFACTURER'S MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC.,

Appellee.

Reply Brief of Appellant Smith to Brief of Appellee Jim Dandy Markets, and to Brief of Appellee Fireman's Fund Insurance Company.

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TOPICAL INDEX.

	PAGE
Reply brief of appellant Smith to brief of Jim Dandy Markets, Inc.	1
Point I	2
Point II	4
Reply brief of appellant Smith to brief of Fireman's Fund In- surance Company	7
Conclusion	7

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Harding v. Robinson, 175 Cal. 534, 166 Pac. 808.....	5
Methodist Episcopal Church v. Seitz, 74 Cal. 287, 15 Pac. 839....	2, 4
Meyerstein v. Burke, 193 Cal. 105, 222 Pac. 810.....	4

STATUTES.

Civil Code, Sec. 1640.....	5
----------------------------	---

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JIM DANDY MARKETS, INC.,

Appellee.

Reply Brief of Appellant Smith to Brief of Appellee Jim Dandy Markets, and to Brief of Appellee Fireman's Fund Insurance Company.

REPLY BRIEF OF APPELLANT SMITH TO BRIEF OF JIM DANDY MARKETS, INC.

Appellant Smith wishes to point out that the conclusions in Point I and Point II made by appellee Jim Dandy Markets are not justified by the facts in the case now before the Court, and, as applied to such facts, the cases cited do not support such conclusions.

POINT I.

As treated by Jim Dandy Markets, an assignment of a lease in "the usual form used by lawyers" always and without any exception carries with it any and all rights the lessee might have in a building situated on the land covered by the lease, and this without regard to the intention of the parties as ascertained from the entire transaction. This result is reached on the erroneous premise that the assignment made by appellant Smith to Jim Dandy Markets can be separated from the agreements, subleases, other documents, and other evidence that the building was not a part of the subject matter of the sale to Jim Dandy Markets. The true rule is that the entire transaction must be considered in determining the intention of the parties, as fully discussed in appellant Smith's Opening Brief beginning on page 14.

The case of *Methodist Episcopal Church v. Seitz*, 74 Cal. 287, 15 Pac. 839, relied on by appellee Jim Dandy Markets, supports the true rule and the Court's decision is based on a determination of what the parties intended, arrived at after full consideration of all elements pertinent to a determination of the intention. Immediately following the quotation printed in Jim Dandy's Markets' Brief, the Court says:

"We do not think this was the intention of the parties. It seems to us that they intended to transfer the ownership of the building, and that the assignment does not defeat this intention."

and again,

"This was the practical construction of the parties, including the defendant; for he joined with plaintiff

in appointing appraisers preparatory to purchasing from plaintiff the ownership which he now says plaintiff never had.”

By posing questions of why Smith did not demand rent and whether any reasonable man would accept bare land without a building, Jim Dandy Markets admits the pertinence of the intention of the parties—it seeks to find the intention from the answers which such questions suggest, instead of an examination of the entire transaction as is done in Smith’s Opening Brief.

The questions might be answered by a question—would any reasonable man convey title to two buildings, one worth \$32,000.00 and the other of comparable value, for no compensation whatever? This question is predicated on the fact that the value of the buildings never entered into the price negotiations and other facts pointed out in appellant Smith’s Opening Brief.

There are some additional facts showing that no compensation was paid for the building. The Supplementary and Modified Agreement provided for the consummation of the contract as to the Atlantic Market on the payment of \$27,300.00 [R. 70]. At the time of the fire there remained unpaid the sum of \$21,700.00 which was paid by the proceeds of the fire insurance on the fixtures, \$20,000.00, and a check of Jim Dandy Markets for \$1,700.00 [R. 205]. Since fixtures and equipment are not insured at their face value and a fire policy does not cover good will or other values of a going business, the deduction is inescapable that the \$27,300.00 was the agreed value of the Atlantic Market not including the building worth in excess of \$32,000.00.

The intention is clearly to assign only the ground lease and not to transfer a building which because of the agreement is personal property and which building was not listed in the inventory [R. 207] of personal property transferred under the contract. By analyzing the transaction and determining the intention of the parties as was done by the Supreme Court of California is the case of *Methodist Episcopal Church v. Seitz*, cited above, the assignment of the ground lease by Smith to Jim Dandy Markets did not convey the title to the building belonging to Smith.

POINT II.

Under this Point Jim Dandy Markets relies on the general principle that a mistake must be mutual and cites authorities to establish that general principle, but to no other effect. They are no help in determining the mutuality of the mistake in the present case.

In the case of *Meyerstein v. Burke*, 193 Cal. 105, 222 Pac. 810, the Court points out that the record discloses a "hopeless conflict in the testimony" and that under such conditions the reviewing Court will not re-examine the evidence but will accept the findings made by the Trial Court. The Trial Court found no mutual mistake was made and that any mistake made by the plaintiff was neither known to nor suspected by the defendants. A conclusion of law from such specific findings is of no help in determining the mutuality of the mistake from the evi-

dence in the case now before the Court, which evidence is undisputed and without contradiction.

Likewise in the case of *Harding v. Robinson*, 175 Cal. 534, 541, 166 Pac. 808, the Court points out that not only the findings but the complaint is “inefficient and inefficacious” to support a judgment on the ground of mistake. The Court then enumerates the various types of mistake, including that defined in Section 1640 of the Civil Code that “when, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous part of the writing disregarded.” This is the exact position taken by appellant Smith. The transaction from the beginning established the subject matter as the fixtures and equipment which were to be transferred from Smith to Jim Dandy Markets. In no instance was any building mentioned as being sold or the title transferred to Jim Dandy Markets. The leases and subleases specifically and by their nature recognized the title in Smith. If title of the Atlantic Market building is transferred to Jim Dandy Markets, it is only so on the theory that an assignment in “the usual form used by lawyers” transferred the building by operation of law and not because the assignment said that the building was transferred.

Since the building was never mentioned in any of the negotiations or documents as a part of the subject matter being transferred and since its value was not an element in fixing the sale price, one of two deductions must of

necessity follow; either the mistake was mutual and neither Smith nor Jim Dandy Markets intended to convey the building; or Jim Dandy Markets knew or suspected that Smith was mistaken when he signed the documents which would have the legal effect of transferring the building.

The evidence of mistake on the part of Smith is direct from himself and his agents and is overwhelmingly supported by all documents and the related facts. It is inconceivable that any of the Jim Dandy partners or agents could have participated as they did in the transaction without being under the same mistake. If they were not mistaken—they were negotiating to buy the building, but kept it a secret from Smith. By keeping it secret they disclosed not only that they “suspected” Smith’s mistake but that they knew it and were deliberately withholding the information from him so that he would sign the document including the assignment without realizing that the building was to be considered as one of the items transferred to Jim Dandy Markets. This is certainly within the perview of the California law of what constitutes a mutual mistake.

Logically the mistake was mutual or known or suspected by Jim Dandy Markets. However, Jim Dandy Markets offered the Court not one word of testimony or evidence to sustain its position or to overcome the obvious and logical deductions.

REPLY BRIEF OF APPELLANT SMITH TO
BRIEF OF FIREMAN'S FUND INSURANCE
COMPANY.

Appellee Fireman's Fund Insurance Company accepts the findings and judgment of the Trial Court that the building was transferred to Jim Dandy Markets, and, on that premise argues that, because of the change in interest, its policy was suspended and there was no liability to Smith. This requires no answer as it completely ignores the questions before this Court.

If this Court determines that Smith did not transfer the building, and the Fireman's Fund Insurance Company then refuses to recognize its liability, Smith will have to take such action as the conditions warrant.

In the meanwhile the Fireman's Fund Insurance Company is a party to this action and will be bound as to any facts adjudicated.

Conclusion.

The judgment should be reversed and judgment entered by this Court that the building in question belonged to appellant Smith at the time of the fire.

Respectfully submitted,

CLYDE THOMAS,

MILAN MEDIGOVICH,

Attorneys for Appellant E. F. Smith.

No. 11982

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC., a Corporation; FIREMAN'S FUND INSURANCE COMPANY, a Corporation; and E. F. SMITH,

Appellees.

Reply Brief of Appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company, to Appellee Fireman's Fund Insurance Company's Brief.

FILED

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TOPICAL INDEX

	PAGE
Reply to argument that appellee Fireman's Fund Insurance Company was not liable to any of the parties.....	1

TABLE OF AUTHORITIES CITED

CASES.	PAGE
Ellis v. Home Ins. Co., 108 Kan. 467, 196 Pac. 598.....	5
Foristiere, A., v. Aetna Insurance Co., 209 Cal. 92.....	4
Fuller v. United States F. Ins. Co., 117 Kan. 282, 231 P. 2d 53	5
Moore v. St. Paul F. & M. Ins. Co., 176 Iowa 549, 156 N. W.	5
Philadelphia Underwriter's Agency v. Moore, 229 S. W. 490....	5
Pomeroy v. Aetna Insurance Co., 86 Kan. 214, 120 Pac. 344....	5
Vierneisel v. Rhode Island Ins. Co., 77 Cal. App. 2d 229, 175 P. 2d 63	4

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Appellees.

Reply Brief of Appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company, to Appellee Fireman's Fund Insurance Company's Brief.

Reply to Argument That Appellee Fireman's Fund Insurance Company Was Not Liable to Any of the Parties.

As appears from the record, E. F. Smith, one of the defendants below, by a separate appeal, appeals from the decision of the Honorable District Court that all right, title and interest of said E. F. Smith to the leasehold described in said assignment, including all the right that defendant E. F. Smith had to the building destroyed by fire, was conveyed to Jim Dandy Markets, Inc. by the assignment

of lease dated June 27, 1946, and that there was no showing of mutual mistake or of any mistake in the execution of said assignment.

If the contentions advanced by appellant E. F. Smith prevail and it is ultimately determined that the insured premises did not pass by the assignment, then it is obvious that the measure of damages adopted by the Honorable Trial Court in allowing recovery in favor of the Jim Dandy Markets, Inc. against appellants Central Manufacturer's Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company for the full amount of the value of the building, is incorrect, and recovery must be limited to the value of the use and occupancy of the building during such time as Jim Dandy Markets, Inc. (these appellants' insured) had the right to occupy said building under the lease, or certainly, at most, the loss and damages sustained by the insured by being deprived of the right of occupancy resulting from the fire.

This would be so, although the appellants' insured, Jim Dandy Markets, Inc., had no interest or claim to the insurance collectible by the owner, E. F. Smith from appellee, Fireman's Fund Insurance Company.

On the other hand, if the decision of the Court below that the building did pass by the assignment of the lease is correct, as pointed out in these appellants' Opening Brief, no dispute exists that the leases were not delivered from escrow and the title did not pass from defendant E. F. Smith to Jim Dandy Markets, Inc. until March 19, 1947, although the fire which destroyed the premises occurred on January 14, 1947.

Thus, the appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual

Insurance Company, contend, on the authorities cited in their Opening Brief, that E. F. Smith did have an insurable interest at the date of the fire.

Counsel for appellants do not believe that the force of these decisions is overcome by the citation of appellee of cases holding that a conditional vendee has an insurable interest, which is not defeated by the so-called "sole and unconditional" clause of standard California fire insurance policies.

Counsel for appellee, Fireman's Fund Insurance Company, has correctly quoted on page 2 of its brief, the provisions of the California standard form fire insurance policies contained in both the policies of appellants and appellee with reference to sole and unconditional ownership, it being provided under

"MATTERS AVOIDING POLICY: * * * Unless otherwise provided by agreement endorsed hereon or added hereto, this entire policy shall be void, * * * (b) if the interest of the insured be other than unconditional and sole ownership * * *."

Also under

"MATTERS SUSPENDING INSURANCE: Unless otherwise provided by agreement endorsed hereon or added hereto this Company shall not be liable for loss or damage occurring, * * * (g) while the interest in, title to or possession of the subject of insurance is changed excepting:—(1) by the death of the insured; (2) a change of occupancy of building without material increase of hazard; and (3) transfer by one or more several copartners or coowners to the others."

The foregoing provisions appear to be subject to two important principles of law. A policy of fire insurance is held not to be voided or invalid where the change of ownership occurs after the issuance of the policy.

It will be noted that the appellee, Fireman's Fund Insurance Company's policy was issued on the 10th day of June, 1945, whereas the defendant E. F. Smith and Jim Dandy Markets, Inc. did not enter into the agreement for the sale of the fixtures, machinery and equipment, nor execute the assignment of the lease until June 12, 1946.

The case of *A. Foristiere v. Aetna Insurance Co.*, 209 Cal. 92, holds that the invalidity of a fire insurance policy cannot be claimed because the interest of the insured in the property is not "unconditional and sole ownership," where the change in ownership occurred after the issuance of the policy.

As to the construction of the provisions providing for suspension of the insurance while the interest in, title to or possession of the subject of insurance is changed, it will be noted that there was no change in possession or occupancy of the building subsequent to the issuance of appellee Fireman's Fund Insurance Company's policy, since Jim Dandy Markets, Inc. was wholly in possession of the building under the pre-existing leases at the time the insurance was written, nor can title be said to have changed since it remained in E. F. Smith until compliance with the terms of the escrow by Jim Dandy Markets, Inc., which as has been seen was subsequent to the fire.

In the case of *Vierneisel v. Rhode Island Ins. Co.*, 77 Cal. App. 2d 229 (175 P. 2d 63), it was held that where the day before the property was destroyed by fire, the vendor had placed the deed in escrow and the vendee had

the right to complete the terms of escrow and thus become entitled to acquire the property that the insured vendors were the sole and unconditional owners of the property at the time of the fire.

The Court cited with approval in the above case, the case of *Pomeroy v. Aetna Insurance Co.*, 86 Kan. 214 (120 Pac. 344), holding that the right to recover on a fire insurance policy is not forfeited because a deed is placed in escrow awaiting the delivery thereof to the vendee.

Other cases holding that the execution of a deed and the deposit of the same in escrow, to be delivered upon the performance of certain conditions to the escrow, effects no change in "interest" within the meaning of conditions in standard fire policies providing for suspension of insurance while the interest in, title to or possession of the subject of insurance is changed.

Moore v. St. Paul F. & M. Ins. Co., 176 Iowa. 549 (156 N. W.);

Ellis v. Home Ins. Co., 108 Kan. 467 (196 Pac. 598);

Fuller v. United States F. Ins. Co., 117 Kan. 282 (231 P. 2d 53);

Philadelphia Underwriters' Agency v. Moore, 229 S. W. 490.

If the Honorable District Court properly determined that defendant and appellee E. F. Smith had no insurable interest in the premises destroyed by fire, the appellants are obviously liable for the full amount of their policies.

It is respectfully submitted, however, that if the insurance afforded by the appellee, Fireman's Fund Insurance Company, was in effect and collectible, that it should be so adjudged and applied to the purchase price of the building and leases, reducing by that amount the loss of appellants' insured, which they are called upon to pay, and this appears to follow on principles of subrogation, regardless of the fact that appellants' insured, Jim Dandy Markets, Inc., generously makes no claim for such payments.

Respectfully submitted,

THOMAS P. MENZIES AND

HAROLD L. WATT,

By HAROLD L. WATT,

*Attorneys for Central Manufacturers' Insurance Company
and Indiana Lumbermen's Insurance Company.*

No. 11982.

IN THE

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E. F. SMITH,

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vs.

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COMPANY, CENTRAL MANUFACTURERS' MUTUAL INSUR-
ANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL
INSURANCE COMPANY,

Appellees,

and

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PANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE
COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC.,

Appellee.

PETITION FOR REHEARING BY APPELLANT
SMITH.

FILED

MAR - 3 1949

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TOPICAL INDEX

	PAGE
I.	
Appellant Smith is entitled to a decision on the equities.....	2
II.	
The opinion is mistaken as to the issue.....	3
III.	
The facts do not support a conclusion that Smith intended to convey title to the building.....	4
IV.	
If an intent to convey the title to the building is to be found from the assignment itself, it should be reformed as being executed under a mutual mistake.....	6

TABLE OF AUTHORITIES CITED

CASES.	PAGE
10 California Jurisprudence, Sec. 30, p. 489.....	2
Civil Code, Sec. 3400.....	2

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CENTRAL MANUFACTURERS' MUTUAL INSURANCE COM-
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COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC.,

Appellee.

PETITION FOR REHEARING BY APPELLANT SMITH.

*To the United States Court of Appeals for the Ninth Cir-
cuit, and the Judges Thereof:*

Comes now E. F. Smith, the appellant in the above en-
titled cause, and presents this, his petition, for a rehearing
of the above entitled cause, and, in support thereof, re-
spectfully shows:

I.

Appellant Smith Is Entitled to a Decision on the Equities.

Reformation of an instrument is an equitable function and a favorite exercise of equity jurisdiction. (10 Cal. Jur., Sec. 30, p. 489.) The California Code emphasizes the equitable nature of the procedure by directing that “for the purpose of revising a contract, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement.” (Cal. Civil Code 3400—Appellant Smith’s Opening Brief, p. 22.)

Courts of equity were created for the purpose of giving relief from inequitable and unconscientious results arising from the strict application of the law.

Appellant Smith is seeking equitable relief from the application of a rule of law by which the title to a building worth more than \$32,000.00 was transferred without any compensation, even though the building was never considered by anyone. It was never once mentioned in any of the negotiations or in any of the written documents, not even the assignment.

Appellant Smith is entitled to a decision on the equities of the case, which, it is respectfully submitted, the court’s opinion does not do but merely recites and gives effect to the rule of law from which appellant Smith is seeking relief in this equitable action.

II.

The Opinion Is Mistaken as to the Issue.

The court, in its opinion, reaches the conclusion that Smith had “conveyed the building” to Jim Dandy Markets at the time of the fire. It supports this conclusion by a recital of and reference to several incidents, all of which hinge on a “transfer” of the “building” from Smith to Jim Dandy Markets as a necessary and essential part of the entire transaction. No consideration whatever is given to a transfer of the title to the building.

The only issue submitted by Smith is that there was no transfer of nor intention to transfer title to the building. He at no time, before or since the fire, asserted or claimed any right to disturb the use and occupancy of the building by Jim Dandy Markets as specifically and directly established in the agreements. The question before the court is whether Smith intended to convey his title to the building. No other issue is submitted.

The building had already been transferred to Jim Dandy Markets which was and had been in possession of it for nearly a year at the time of the supplementary and modified agreement. Following the consummation of the supplementary and modified agreement and up to and at the time of the fire, Jim Dandy was still in possession of the building. Its status was established in a document executed in consummation of the original agreement and entitled “Sublease.” [Record 195.] This document subleased the real property and by its terms declared the building to belong to Smith. [Record 197, 199.] It was to run for the unexpired term of the land leases, including the time covered by options of renewal [Record 198] for a period not exceeding ten years. [Record 200.]

Thus the "building" had already been conveyed and transferred for a period of ten years, and Smith had no right to remove or otherwise interfere with its use and occupancy by Jim Dandy Markets prior to the termination of that term.

The issue is only as to the transfer of the title to the building.

III.

The Facts Do Not Support a Conclusion That Smith Intended to Convey Title to the Building.

The facts to which reference is made by the court are not pertinent to and do not support a conclusion that Smith intended to convey the title to the building.

Thus the court states that the purpose of the agreement could not be attained through the transfer of the land and equipment but not the store building. The title to the land was not transferred and could not be by the parties involved. The use and occupancy of the store building coincided with the right to use and occupy the land. The ownership of the title to the building by Smith was no more disturbing than was the ownership of the title of the land by the landlord.

The reservation of the right to remove the building at the termination of the lease did not plunge the agreement into inconsistency and confusion any more than did the right of the owner of the land to refuse to renew the lease when the term expired.

If Smith had immediately attempted to remove the building or if there had been any other threatened or anticipated interference with its use and occupancy by Jim

Dandy Markets, the statement of the court that the land lease, fixtures, equipment, and machinery had no usefulness apart from the building would be pertinent, but such was not the case. We are talking only about a transfer of title without any change in the use or occupancy.

The same is true of the court's statement that Jim Dandy intended to gain complete control over the facilities. It already had such control, and the control was not disturbed by the ownership of the title by Smith. He did not claim or threaten any disturbance of such control. He was in no different position than the owner of the land as to what would be done at the end of the term.

The court supports its conclusion by a statement that there is no reference to rent for the Atlantic Market. The building, as established by the insurance company's appraisal, was worth in excess of \$32,000.00. The evidence is uncontradicted and unassailed that the value of the building was not included in the price for which the fixtures and equipment were sold. The court, by its opinion, takes title to the building from Smith without any consideration whatever and gives it to Jim Dandy without any payment whatever. It then attempts to support this inequitable result by reference to another inequity—the failure of Smith to get rent for the building. One inequity does not justify a court of equity approving another. No fact is cited supporting a conclusion that Smith intended to convey title to the building or that Jim Dandy Markets expected to receive title thereto. And there are no facts supporting such conclusion in the record.

IV.

If an Intent to Convey the Title to the Building Is to Be Found From the Assignment Itself, It Should Be Reformed as Being Executed Under a Mutual Mistake.

The attorney for Jim Dandy Markets during the oral argument before this court probably made an accurate statement of what actually happened when he said that everyone just forgot about the building. This being true, the assignment should be reformed so as not to convey title to the building. Certainly Smith did not intend to give away a building worth more than \$32,000.00. Certainly Jim Dandy Markets did not expect to receive title to a building of that value without paying for it. Instead of bringing about the unjust enrichment of Jim Dandy at the expense of Smith, this court of equity should correct the error, if any, so as to leave the parties with their own property.

Furthermore, the recognition of the title of the building in Smith will not, in any large amount, be detrimental to Jim Dandy. It had an insurable interest in the building and is entitled to recover its losses as a result of the fire. Although Jim Dandy has been carrying on the fight, the actual benefit is that reaped by Smith's insurance carrier. A declaration that the title to the building is in Jim Dandy relieves it from liability on a policy for which it collected premiums from Smith. If the title of Smith is established by this court, Smith will then be in position to make demands on his insurance carrier for

his losses. This is all equitable and a result which a court of equity should strive to bring about. A rehearing should be granted, consideration given to the equities and the point in issue, and the judgment of the District Court reversed.

Respectfully submitted,

CLYDE THOMAS,

MILAN MEDIGOVICH,

Attorneys for Appellant Smith.

Certificate of Counsel.

I, counsel for the above named appellant Smith, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

CLYDE THOMAS,

